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22-208

Argued.

Oct. 28. 1874.

Field J.

certiorari issued
to bring up judgt.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~312~~ 240

JOHN M. SWEENEY AND ANTON M. HOLTER, PLAINTIFFS IN ERROR,

vs.

JOSEPH A. LOMME.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED DECEMBER 3, 1872.

Oct 5 1874

SUPREME COURT OF THE UNITED STATES.

No. 312.

JOHN M. SWEENEY AND ANTON M. HOLTER, PLAINTIFFS IN ERROR,

vs.

JOSEPH A. LOMME.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

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1 In 3rd judicial district court, Lewis and Clarke County, Montana Territory.

JOSEPH A. LOMME
vs.
JOHN M. SWEENEY AND ANTON M. HOLTER.

Be it remembered that the defendants in the above-entitled cause, on the 22nd day of November, A. D. 1871, filed herein his bill of exceptions in words and figures following, to wit:

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

In the district court, 3rd judicial district, in and for the county and Territory aforesaid.

JOSEPH A. LOMME, PLAINTIFF,
vs.
JOHN M. SWEENEY AND ANTON M. HOLTER,
defendants.

Be it remembered that among the records and proceedings had and done in the above-entitled cause were the following, to wit:

On the day of , A. D. 187 , plaintiff filed his complaint herein in the above-entitled cause, of which the following is a true copy:

In 3rd judicial district court, Lewis and Clarke County, Montana Territory.

2 JOSEPH A. LOMME
vs.
JOHN M. SWEENEY AND ANTON M. HOLTER.

The plaintiff in this cause, by Chumasero & Chadwick, his attorneys, complains against the defendants, and states that, heretofore, to wit, on the eleventh day of October, A. D. 1869 this plaintiff commenced his action in this court against B. C. Kintzing and Charles S. Kintzing, late partners under the name and firm of B. C. Kintzing & Company, for the recovery of money, and then and there procured to be issued an attachment out of said court, directed to the sheriff of said county, by which said sheriff was directed to attach and safely keep sufficient property of the defendants in said action to satisfy the demand of this plaintiff in said action, to wit, the sum of four thousand three hundred and eighty-four dollars and eighty nine cents, together with costs and expenses.

That, under and by virtue of said writ of attachment, W. K. Roberts, who was then the acting sheriff of said county, seized and levied upon certain property of said B. C. Kintzing & Company, to wit: 12½ casks Viton brandy, one ten-gallon keg of whiskey, 3 barrels of cabinet whiskey, 5 gallons C. K. whiskey, 4½ barrels of whiskey, 3 barrels of rum, 2 casks Thomas Hine brandy, 14 10-gallon empty kegs, 6 1-gallon empty kegs, 1 billiard-table, 1 bay mare and job-wagon, of the value of five thousand dollars.

That, after the property had been so seized and taken possession of by

said sheriff, one W. S. Watson commenced an action in this court to recover possession of the said property against said W. K. Roberts, sheriff as aforesaid.

That, in the course of such action, such proceedings of claim and delivery, under chapter second of the civil practice act, were had. That, on the 12th day of October, 1870, the defendants made and delivered to the coroner, for the use of this plaintiff, pursuant to the provisions of said chapter, their written undertaking, of which the following is a copy:

In the district court of the third judicial district of the Territory of Montana, in and for the county of Lewis and Clarke.

Undertaking on claim and delivery of personal property.

W. S. WATSON, PLAINTIFF,
vs.
W. K. ROBERTS, DEFENDANT.

Whereas it is alleged by the plaintiff in the above-entitled action that the defendant in the said action has in his possession and unjustly detained certain personal property belonging to the said plaintiff, to the possession of which the plaintiff is lawfully entitled, of the value of two thousand five hundred dollars; and whereas the said plaintiff, being desirous of having said property delivered to him, and by endorsement in writing (in writing) upon the affidavit has required the coronor of the county of Lewis and Clarke to take the said property from the said defendants:

Now, therefore, we, the undersigned residents of the said county, in consideration of the premises, and of the delivery of the said property to the said plaintiff, do hereby undertake and acknowledge to the effect that we are, jointly and severally, bound in the sum of five thousand dollars, (being double the value of the said property as stated in the affidavit,) for the prosecution of the said action for the return of the said property, if return thereof be adjudged, and for the payment to the said defendant of such sum as may from any cause be recovered against the said plaintiff.

Dated this eleventh day of October, A. D. 1869.

JOHN M. SWEENEY. [SEAL.]
A. M. HOLTER. [SEAL.]

That the personal property referred to in said undertaking was returned to the said W. S. Watson, plaintiff in said action, pursuant to said undertaking, and to a requisition of said W. S. Watson, made pursuant to the provision of said chapter of said civil practice act. That, in the course of such action of said Watson against said Roberts, such proceedings were afterwards had that, on the 6th day of April, 1870, the said W. K. Roberts, sheriff as aforesaid, recovered judgment which was duly given by said court in said action against said W. S. Watson, the plaintiff therein. That the said W. K. Roberts, defendant therein, recover possession of said property and his costs therein, and disbursements amounting to the sum of $340.45; and the said undertaking was thereupon delivered to this plaintiff.

That no return of the property has been had, and no part of said judgment has been satisfied. This plaintiff further avers that the value of the said property is the sum of five thousand dollars; that this plaint-

iff, on the 26th day of October, A. D. 1870, recovered judgment
5 against B. C. Kintzing and C. S. Kintzing in said action so commenced by him against them, and in which said attachment was as so aforesaid issued and levied on said property for the sum of four thousand nine hundred and fifty-four and $\frac{93}{100}$ dollars debt, and five hundred and fifty-two $\frac{55}{100}$ dollars costs.

And that no part thereof has been paid, except the sum of two hundred and sixty-nine and $\frac{45}{100}$ dollars collateral, by sale of certain real estate of B. C. and C. S. Kintzing, on an execution issued in said cause on said judgment therein, and also the sum of one thousand and sixty-one $\frac{18}{100}$ dollars also collected, and which said execution has been returned unsatisfied for the ballance thereof. And the said plaintiff further says that said W. S. Watson did not prosecute his said action against said W. K. Roberts with effect, but failed to do so, and has not returned the said property or any part thereof, notwithstanding return thereof was adjudged. That, in consequence thereof, and by reason of the premises, the said plaintiff has sustained damages in the sum of four thousand and five hundred and sixteen dollars and eighty cents, ($4,516.80,) for which said sum, with interest thereon at the rate of ten per cent. per annum from the twenty-sixth day of October, 1870, he demands judgment against the defendant, besides costs.

CHUMASERO & CHADWICK
Plaintiff's Attorneys.

TERRITORY OF MONTANA,
Lewis and Clarke County, ss:

6 Joseph Lomme, being duly sworn, says that he is plaintiff in the above action; that he has heard the foregoing complaint read, and knows the contents thereof; and that he has good reason to believe, and does believe, that the matters as therein set forth are true.

J. A. LOMME.

Subscribed and sworn to before me this 14th day of February, 1871.

RICHARD LOCKEY,
Notary Public, M. T.

To which complaint defendants filed their demurrer, of which the following is a copy, to wit:

JOSEPH A. LOMME, PLAINTIFF,
vs.
JOHN M. SWEENEY AND ANTON M. HOLTER,
defendants.

In the district court, 3rd judicial district, in and for the county of Lewis and Clarke and Territory of Montana.

Now comes the defendant, A. M. Holter, and demurs to the complaint of the plaintiff in the above-entitled cause, for the following reasons, to wit:

1st. There is a misjoinder of parties plaintiffs.

2nd. Said complaint does not show any authority in said plaintiffs to maintain this action upon the undertaking sued on.

3rd. Said complaint shows that said plaintiffs are not the real parties in interest.

7 4th. Said complaint does not show that [such] *said* judgment was rendered against said Watson, as entitles plaintiff, or any one else, to recover on the undertaking sued on, or that demand was made of said Watson.

5th. Said complaint is insufficient in law.

TOOLE & TOOLE,
Attorneys for Holter.

And afterwards, to wit, said demurrer coming on to be heard, after being considered by the court, was overruled; of which order overruling said demurrer the following is a copy, to wit:

JOSEPH A. LOMME
vs.
JOHN M. SWEENEY ET AL.

This cause having been heard on the demurrer on the complaint, and taken under advisement, now therefore it is "Ordered that said demurrer be, and the same is hereby, overruled."

To which ruling of the court the defendants then and there excepted.

And afterwards, to wit, on the day of , A. D. 1871, defendants filed their answer to said complaint, of which the following is a copy to wit:

In 3d judicial district court, Lewis and Clarke County, M. T.

JOSEPH A. LOMME
vs.
JOHN M. SWEENEY AND ANTON M. HOLTER.

Now comes the defendants, and, for answer to the complaint of the plaintiff in the above-entitled cause, admit that said plaintiff commenced an action against B. C. Kintzing and Charles S. Kintzing, under the firm of B. C. Kintzing & Co., and caused an attachment to be delivered to one W. K. Roberts, the sheriff of said county, and that said sheriff levied upon the property described in the complaint in this cause, but deny that said B. C. Kintzing and Charles S. Kintzing, or either of them, had any interest in said property, and aver that said property was not subject to levy or seizure under said attachment, and that said B. C. Kintzing and Cha's S. Kintzing, nor either of them, had any attachable interest therein; admit that, subseqnently thereto, one W. S. Watson claimed said property, and commenced an action against said W. K. Roberts to recover possession thereof; admit that said property was taken possession of, and delivered to the said W. S. Watson. And these defendants, for further answer to the complaint herein, aver that said Cha's S. Kintzing was, on the day of , 1869, declared a bankrupt by the United States district court in and for the county and city of St. Louis, State of Missouri, by the judgment and decree of said court; and that said court was a court of competent jurisdiction, and had full and complete jurisdiction thereof; and that said proceedings were had under an act of the Congress of the United
9 States, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved, March 2nd, 1867. Denies that on the 6th day of April, 1870, or at any other time, said W. K. Roberts, sheriff as aforesaid, recovered judgment against said Watson, and that said judgment was duly given. These defend-

ants, further answering the complaint herein, aver that no valid verdict, as required by law, was rendered in said action, wherein W. S. Watson was plaintiff, and said W. K. Roberts, defendant, in which said action the undertaking sued on was given; that the jury in said action did not find that said Roberts was entitled to a return of the property sued for, nor for the value thereof in case a return could not be made; admit that said W. K. Roberts recovered judgment against said Watson in the action wherein the undertaking sued on was given for three hundred and fourty dollars and forty-five cents, but for no other sum whatever, and for which said sum of $340.45 defendants admit plaintiff is entitled to judgment; deny that plaintiff has been damaged in the sum of $4,516.80 *dollars*, or any other sum whatever. Wherefore defendants ask to be discharged from any further costs herein.

SHOBER & LOWERY,
TOOLE & TOOLE,
Defendants' Attorneys.

LEWIS & CLARKE COUNTY,
Montana Territory:

10 Joseph K. Toole, being duly sworn, says he is one of the attorneys for defendants; that he has read the foregoing answer and knows the contents thereof; that he has reason to believe, and does believe, the matters and things as therein stated are true.

JOSEPH K. TOOLE.

Subscribed & sworn to before me August 3d, 1871.

J. H. SHOBER,
Notary Public.

And afterwards, to wit, on the day of , A. D. 1871, this cause coming on for trial upon the pleadings herein, and a jury being duly empannelled, plaintiff offered in support of the issues on his part the following, to wit:

1st. Complaint and answer in case No. 1038, of which the following are copies, to wit:

In the 3rd judicial district court, Lewis & Clarke County, Montana Territory.

W. S. WATSON, PL'FF,
vs.
W. K. ROBERTS, DEF'T.

W. S. Watson, plaintiff in the above-entitled cause, for complaint herein against the above-named defendant, states:

1. That, on the 11th day of October, A. D. 1869, at the town of Helena, Lewis and Clarke County, Montana Territory, the plaintiff was the owner and possessed of the following personal property, to wit: 12 eight's

11 casks Viton brandy, of the value of $500.00; one ten-gallon keg whiskey, of the value of twenty dollars; one 15-gallon keg whiskey, of the value of thirty dollars; 3 barrels of Cabinet whiskey, of the value of two hundred and fifty dollars; 5 barrels of O. K. whiskey, of the value of three hundred and seventy-five dollars; four half-barrels O. K. whiskey, of the value of one hundred dollars; 3 barrels of rum, of the value of one hundred and fifty dollars; 2 barrels Jama'ca rum, of the

value of one hundred and fifty dollars; 2 casks Thomas Hine brandy, of the value of four hundred and seventy-five dollars; 14 ten-gallon kegs, of the value of ten dollars; 6 one-gallon kegs, of the value of five dollars; 1 billiard-table, of the value of one hundred and thirty-five dollars; 1 bay mare, of the value of one hundred and fifty dollars; and one job-wagon, of the value of one hundred & fifty dollars.

2. That the said defendant, on the 11th day of October, A. D. 1869, at Helena, Lewis & Clarke County, Montana Territory, without the plaintiff's consent, and wrongfully and unlawfully, took said goods and chattels from the possession of the plaintiff.

3. That before the commencement of this action, to wit, on the 11th day of October, A. D. 1869, the plaintiff demanded of the defendant possession of said goods and chattels, but to deliver the same the defendant refused.

4. That said defendant still unlawfully with'olds and detains said goods and chattels from the possession of the plaintiff, to his damage in the sum of five hundred dollars.

12 Wherefore the plaintiff demands judgment against the defendant for the recovery of the possession of said goods and chattels, or for the sum of two thousand five hundred dollars, the value thereof, in case delivery cannot be had, together with five hundred dollars damage, and for costs of suit.

SHOBER AND LOWRY,
Plaintiff's Attorneys.

TERRITORY OF MONTANA,
Lewis & Clarke County:

W. S. Watson, being duly sworn, says that he is the plaintiff in the foregoing complaint, and that he has heard the same read and knows the contents thereof, and that the same is true of his own knowledge.

W. S. WATSON.

Subscribed & sworn to before me this 11th day of October, A. D. 1869.

J. H. SHOBER,
Notary Public.

To which defendant answered:

In 3rd judicial district court, Lewis and Clarke County, Montana Territory.

W. S. WATSON }
vs.
W. K. ROBERTS. }

The defendant, W. K. Roberts, by Chumasero and Chadwick, his attorneys, answering the conplaint herein, denies that, on the 11th day of October, A. D. 1869, the plaintiff was the owner of the personal property in said complaint mentioned.

13 Denies that he, this defendant, on the 11th day of October, A. D. 1869, at the place in said complaint mentioned, without the consent of plaintiff, wrongfully and unlawfully took said goods and chattels from the possession of the plaintiff.

Denies that he still unlawfully with'olds and detains said goods and chattels from the possession of the plaintiff, to his damage in the sum of five hundred dollars, or any other sum.

And for further defence, denying the matters in the complaint alleged in manner and form as the same are hereinbefore denied, the defendant avers that, heretofore, in the action now pending in this court, wherein Joseph A. Lomme is plaintiff, and B. C. Kintzing and Charles S. Kintzing are defendants, a certain writ of attachment was, on the said eleventh day of October, A. D. 1869, issued by the clerk of said court in due form of law, directed and delivered to this defendant, as sheriff of said county of Lewis and Clarke, for service, whereby, after stating and reciting the matters by law required to be stated and set forth in such case, and after setting forth that said action was brought by the plaintiff therein named to recover of and from the said B. C. Kintzing and C. S. Kintzing the sum of $4,384.89 and costs of suit, this defendant was, in substance, commanded to attach and safely keep all the property of the said B. C. & C. S. Kintzing within his county not exempt from execution, or so much thereof as might be sufficient to satisfy the plaintiff's demand, &c.; that under and by virtue of the said attachment
14 this defendant, as sheriff of the county of Lewis and Clarke, and not otherwise, levied upon and attached certain goods and chattels, which are the same mentioned in the said complaint, and took the same into his custody, and that the said levy, attaching, taking, and detention, as aforesaid, constitute the supposed wrongful taking in the complaint alleged. But this defendant, upon his information and belief, avers that the said goods so levied on and attached were, at the time of said levy and attachment, the property of the said B. C. Kintzing and Charles S. Kintzing, or that the said B. C. Kintzing and Charles S. Kintzing, or one of them, had an interest therein, liable to levy and sale under execution.

This defendant further denies that, by reason of the taking alleged in the complaint, or of any act or acts of the defendant, the plaintiff has sustained damage to the amount of five hundred dollars, or any damage whatever.

Wherefore he asks judgment for a return of said property and for his costs.

CHUMASERO & CHADWICK,
Defendant's Attorneys.

TERRITORY OF MONTANA,
Lewis & Clarke County, ss:

W. K. Roberts, being duly sworn, says that he has heard the foregoing answer read, and knows the contents thereof; and that he has reason to believe, and does believe, the matters therein stated to be true.

W. K. ROBERTS.

15 Subscribed and sworn before me this 21st day of October, A. D. 1869.

CHARLES G. REYNOLDS,
Deputy Clerk.

2nd. The judgment and verdict in said cause number 1038, of which the following are copies, to wit:

Verdict.

W. S. WATSON
vs.
W. K. ROBERTS.

We, the jury in the above-entitled cause, find for defendant.
JAMES L. BYERS, *Foreman.*

Upon which the following judgment was entered:

In district court, third judicial dist., county of Lewis & Clarke, Territory of Montana.

W. S. WATSON, PL'FF,
vs.
W. K. ROBERTS, D'F'T.

This action came on regularly for trial. The said parties appeared by their attorneys. A jury was regularly empannelled and sworn to by said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names, and say that they find a verdict for the defendant. And afterwards, on the 6th day of April, A. D. 1870, it is ordered by the court that the judgment be entered herein upon the verdict in favor of said defendant, W. K. Roberts, and against the said plaintiff, W.
16 S. Watson, for the return of the property replevied in this action, together with said defendant's costs and disbursements in this action incurred.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that said defendant, W. K. Roberts, do have and recover from said plaintiff, W. S. Watson, the possession of said property replevied in this action, together with said defendant's costs and disbursements incurred in this action, amounting to the sum of five hundred and fifty-two $\frac{05}{100}$ dollars.

April 6th, 1870.

3rd. Affidavit and undertaking in said case number 1038, of which the following are copies, to wit:

Affidavit on claim and delivery of personal property.

In the district court of the 3 judicial district of the Territory of Montana, in and for the county of Lewis & Clarke.

W. S. WATSON, PLAINTIFF,
against
W. K. ROBERTS, DEFENDANT.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

W. S. Watson, the plaintiff in the above-entitled action, being duly sworn, says that the said plaintiff is the owner of and lawfully entitled to the possession of the following-described personal property, to wit:

12½ casks Veton brandy, 1 ten-gallon keg whiskey, 1 15-gallon keg whiskey, 3 bbls. cabinet whiskey, 5 gall's O. K. whiskey, 4½ bbls. whiskey, 3 bbls. rum, 2 bbls. Jama'ca rum, 2 casks Thomas Kline
17 brandy, 14 10-gallons empty kegs, 6 1-gallon empty kegs, 1 billard-table, 1 bay mare and job-wagon.

That the said property is in the possession of and wrongfully detained by the defendant in said action; that the alleged cause of the detention of the said property, according to this affiant's best knowledge, information, and belief, is the following, to wit: the said defendant, as sheriff, holds the same as the property of B. C. Kintzing and Charles S. Kintzing; that said property, or any part thereof, has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or an attachment against the property of the said plaintiff, and that the actual value of the said property is the sum of two thousand five hundred dollars.

W. S. WATSON.

Subscribed and sworn to before me this 11th day of October, A. D. 1869.

J. H. SHOBER,
Notary Public, M. T.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

The coroner of the county of Lewis & Clarke is hereby ordered and required to take from the defendant named in the within entitled action the within mentioned and described personal property, (if the said property be found in said county of Lewis & Clarke.)

Dated this eleventh day of October, A. D. 1869.

J. H. SHOBER,
Attorney for Plaintiff.

18 I served the within affidavit and order by giving to W. K. Roberts a copy hereof, and taking the within-named property and delivered the same to plaintiff in consequence of no bond being given by defendant in the time allowed by law.

B. C. BROOKE, *Coroner.*

Undertaking.

In the district court of the third judicial district of the Territory of Montana, in and for the county of Lewis & Clarke.

W. S. WATSON, PLAINTIFF, *against* W. K. ROBERTS, DEFENDANT.	Undertaking on claim and delivery of personal property.

Whereas it is alleged by the plaintiff in the above-entitle actions that the defendant in the said action has in his possession and unjustly detains certain personal property belonging to the said plaintiff, to the possession of which the said plaintiff is lawfully entitled, of the value of two thousand five hundred dollars; and whereas the said plaintiff, being desirous of having the said personal property delivered to him, and, by endorsement in writing upon the affidavit, has required the coroner of the county of Lewis and Clarke to take the said property from the said defendant:

Now, therefore, we, the undersigned, residents of the said county, in consideration of the premises, and of the delivery of said property to the said plaintiff, do hereby undertake and acknowledge to the effect that we are, jointly and severally, bound in the sum of five thousand
19 dollars, (being double the value of said property as stated in the affidavit,) for the prosecution of said action for the return of the said property to the said defendant, if return thereof be adjudged, and for the payment to the said defendant of such sum as may from any cause be recovered against the said plaintiff.

Dated this eleventh day of October, A. D. 1869.

JOHN M. SWEENEY. [SEAL.]
A. M. HOLTER. [SEAL.]

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

John M. Sweeney and A. M. Holter, the sureties, whose names are subscribed to the above undertaking, being severally duly sworn, each for himself, says: That he is a resident and a house-holder within the said Lewis & Clarke County, and that he is worth double the sum specified in the said undertaking as the penalty thereof, over and above all his debts and liabilities, exclusive of property exempt from execution.

JOHN M. SWEENEY.
A. M. HOLTER.

Subscribed & sworn to before me this 12th day of October, A. D. 1869.

J. H. SHOBER,
Notary Public, M. T.

I served the within undertaking by showing the same to W. K. Roberts, and by delivery to him of a copy thereof October 12th, 1869, in Lewis and Clarke County, Montana Territory.

B. C. BROOKE, *Coroner.*

Filed November 5th, 1869.

CHA'S G. REYNOLDS,
Deputy Clerk.

20 4th. Execution for costs in case number 1038, of which the following is a copy, to wit:

In the district court of the third judicial district of the Territory of Montana, in and for the county of Lewis and Clarke.

The people of the Territory of Montana to the sheriff of the county of Lewis & Clarke, greeting:

Whereas, on the 6th day of April, A. D. 1870, W. K. Roberts recovered a judgment in the said district court of the third judicial district of the Territory of Montana, in and for the county of Lewis and Clarke, against W. S. Watson, for the sum of five hundred and fifty-two $\frac{05}{100}$ dollars costs of suit, with interest at the rate of ten per cent. per annum till paid, and accruing costs, amounting to the sum of two $\frac{10}{100}$ dollars, as appears to us of record; and whereas the judgment-roll in the action in which said judgment was entered, is filed in the clerk's office of said court in the county of Lewis and Clarke, and the said

judgment was docketed in said clerk's office, in the said county, on the day and year first above written, and the sum of $554.15, with interest, is not (at the date of this writ) actually due on said judgment:

Now you, the said sheriff, are hereby required to make the said sums due on the said judgment for costs, with interest as aforesaid, and costs and accruing costs to satisfy the said judgment, out of the personal property of said debtor, or, if sufficient personal property of said debtor cannot be found, then out of the real property in your county be-
21 longing to him on the day whereon said judgment was docketed in the said county, or at any time thereafter, and make return of this writ within sixty days after your receipt hereof, with what you have done endorsed hereon.

Witness honorable G. G. Symes, judge of the said third judicial district of the Territory of Montana, at the court-house in the county of Lewis and Clarke, this 2nd day of November, A. D. 1870.

Attest my hand and the seal of said court the day and year last above-written.

[SEAL OF COURT.] CHARLES W. FOWLER, *Clerk.*

Clerk received from b'l'ff Watson.....	$29 00
Coroner " " " "	25 00
	$54 00

Levy.

$144.00, jury fees; $344.00, p'l'ff's witnesses; $2.85, sheriff's costs; $25.00, coroner's fees; $36.20, clerk's costs; $2.10, accruing costs; $1.70, sheriff's accruing

I can find no goods, chattels, or real property, belonging to the judgment debtor, out of which to make the amount of the within execution, or any part thereof.

Jan'y 2nd, 1871.

W. L. STEELE, *Sheriff.*
By WES. ALEXANDER,
Under Sheriff.

Filed Jan'y 2, 1871.

SCRIBNER, *Clerk.*
REYNOLDS,
Deputy Clerk.

Came to hand November 3rd, 1870.

5th. Execution, levy and return, in case number 1037, which is in words and figures following, to wit:

22 In the district court of the third judicial district of the Territory of Montana, in and for the county of Lewis and Clarke.

The people of the Territory of Montana to the sheriff of the county of Louis and Clarke, greeting:

Whereas on the 27th day of October, A. D. 1870, Joseph A. Lomme recorded a judgment in the said district court of the third judicial district of the Territory of Montana, in and for the county of Lewis and

Clarke, against B. C. Kintzing and Cha's S. Kintzing, partners under the firm-name of B. C. Kintzing & Co., for the sum of four thousand nine hundred and fifty-four $\frac{93}{100}$ dollars damages, with interest at the rate of ten per cent. per annum till paid, together with plaintiff's costs and disbursements at the date of said judgment and accruing costs, amounting to the sum of three hundred and forty $\frac{45}{100}$ dollars as appears to us of record. And whereas the judgment-roll in the action, in which said judgment was entered, is filed in the clerk's office of said court, in the county of Lewis and Clarke, and the said judgment was docketed in said clerk's office in said county on the day and year first above-written, and the sum of $5,295.35, with interest, is now (at the date of this writ) actually due on said judgment:

Now you, the said sheriff, are hereby required to make the said sums due on the said judgment for damages, with interest as aforesaid, and costs and accruing costs, to satisfy the said judgment, out of the
23 separate personal property of said debtor, B. C. Kintzing, as well as the joint personal property of both the said debtors; or if sufficient personal property of said debtors cannot be found, then out of the real property in your county belonging to him or them on the day whereon said judgment was docketed in the said county, or at any time thereafter, and make return of this writ within sixty days after your receipt hereof, with what you have done endorsed thereon.

Witness honorable G. G. Symes, judge of the said third judicial district of the Territory of Montana, at the court-house in the county of Lewis and Clarke, this 2nd day of November, A. D. 1870.

Attest my hand and the seal of said court the day and year last above written.

[SEAL OF COURT.] CHARLES W. FOWLER, *Clerk.*
By CHA'S G. REYNOLDS,
Deputy Clerk.

Levy.

$4,954.93, damages; $47.80, clerk's costs; $42.55, sheriff's costs; $248.00, plaintiff's witnesses; do., $2.10, clerk's accruing costs—$5,295.38.

Under the said execution the sheriff made a levy, which is in words and figures following, to wit:

By virtue of the within execution, on this the 3rd day of November, 1870, I levied upon all the right, title, and interest that B. C. & C. S Kintzing has in and to the following described property, to wit:

1	case Cal. sherry.	10$\frac{1}{8}$	casks Viton brandy.
4	" brandy.	4	bbls. sherry.
1	" " cherries.	6	" Port wine.
	4 cases ginger wine.	3	" Rey gin.
24	2 cases Port wine.	2	bbls. Port juice.
	1 " Baker's bitters.	1$\frac{1}{8}$	cask T. H. & C. brandy.
1	" sherry.	1	bbl. New Bedford rum.
10	" whiskey, (1 part full.)	2	" pure Jama'ca rum.
3	" rum punch.	1	bbl. old Jama'ca rum.
1	" ginger wine.	1	" ⟨H⟩ sherry.
1	" brandy peaches.	1	" whiskey, (part full.)
2	" London cordial, (part full.)	1	" Brown sherry.

Also the following real property, to wit: The following grounds, pieces, or parcels of land in Helena City: Lots No. thirteen, (13,) fourteen, (14,) and fifteen, (15,) in block No. thirty-five, (35,) it being the property known as the O. K. warehouse and O. K. office, fronting on the public square in Helena City aforesaid; also, lot No. eighteen, (18,) in block No. fifty-nine, (59,) being west of Last Chance gulch, including the building thereon used as a powder magazine, together with all the appurtenances thereunto belonging or in anywise appertaining.

W. L. STEELE, *Sheriff.*
By WES. ALEXANDER,
Under Sheriff.

Upon said execution and levy the sheriff made return, which is in words and figures following, to wit:

I, W. L. Steele, sheriff of the county of Lewis & Clarke, Montana Territory, do hereby certify that, by virtue of the annexed execution, I advertised the real property herein levied on, as follows, to wit: The following ground, pieces, or parcels of land in Helena City: Lots number thirteen, (13,) fourteen, (14,) and fifteen, (15,) in block No. thirty-five, (35,) it being the property of known as the O. K. ware-
25 house and O. K. office, fronting on the public square in Helena City aforesaid; also, lot No. eighteen, (18,) in block No. fifty-nine, lieing west of Last Chance gulch, including the building thereon used as a powder-magazine, together with all the appurtenances thereunto belonging, or in anywise appertaining; to be sold by me at the east door of the court-house in Helena City, Montana Territory, on the 29th day of November, 1870, between the hours of 9 o'clock a. m. and 5 o'clock p. m., of said day; that, previous to said sale, I caused due and legal notice thereof to be published at least once a week for three weeks successively, immediately before said sale, in the "Daily Rocky Mountain Gazette," a daily newspaper published in the said city of Helena, and caused the said notice to be posted in three of the most public places in the city of Helena aforesaid, for the same period preceding such sale; and that, on the 29th day of November, 1870, the day on which said premises were so advertised to be as aforesaid sold, I attended at the time and place fixed for said sale, and exposed the said premises for sale at public auction, according to law, to the highest and best bidder, for cash in hand, when Joseph A. Lomme, being the highest bidder therefore, the said premises were struck off by me to the said Joseph A. Lomme, for the sum of three hundred and thirty dollars.

Lots 13, 14, & 15 for	305 00
" 18	25 00
	$330 00

Which was the whole price bid.

26 W. L. STEELE, *Sheriff.*
By WES. ALEXANDER,
Under Sheriff.

Sheriff's accruing costs	41 45	
Printer's fees	20 00	
		61 45
Amount down		5,295 38
		5,356 83

Amount of sale..... 330 00

Bal'c. due..... $5,026 83

Besides interest.

January 2nd, 1870.

W. L. STEELE, *Sheriff.*
By WES. ALEXANDER,
Under Sheriff.

Filed Jan'y 2, 1871.

SCRIBNER, *Clerk.*
REYNOLDS,
Deputy Clerk.

In the district court of the third judicial district of the Territory of Montana, in and for the county of Lewis and Clarke.

The people of the Territory of Montana to the sheriff of the county of Lewis and Clarke, greeting:

Whereas, on the 27th day of October, A. D. 1870, Joseph A. Lomme recovered a judgment in the said district court of the third judicial district of the Territory of Montana, in and for the county of Lewis and Clarke, against B. C. Kintzing and Charles S. Kintzing, partners under the firm-name of B. C. Kintzing & Co., for the sum of four thousand nine hundred and fifty-four $\frac{93}{100}$ dollars damages, with interest at the
27 rate of ten per cent. per annum till paid, together with plaintiff's costs and disbursements at the date of said judgment, and accruing costs, amounting to the sum of four hundred and four dollars, as appears to us of record.

And whereas the judgment-roll in the action in which said judgment was entered is filed in the clerk's office of said court, in the county of Lewis and Clarke; and the said judgment was docketed in said clerk's office in said county on the day and year first above written;

And the sum of $5,358.93, with interest on the sum of $330.00, made on former execution, is now (at the date of this writ) actually due on said judgment:

Now you, the said sheriff, are hereby required to make the said sums due on the said judgment for damages, with interest as aforesaid, and costs and accruing costs, to satisfy the said judgment, out of the separate personal property of said debtor, B. C. Kintzing, as well as the joint personal property of both said debtors; or if sufficient personal property of said debtors cannot be found, then out of the real property in your county belonging to him or them on the day whereon said judgment was docketed in the said county, or at any time thereafter; and make return of this writ within sixty days after your receipt hereof, with what you have done endorsed thereon.

Witness honorable H. L. Warren, judge of the said third judi-
28 cial district of the Territory of Montana, at the court house in the County of Lewis and Clarke, this 7th day of February, A. D. 1871.

Attest my hand and the seal of said court the day and year last above written.

[SEAL.]

W. S. SCRIBNER, *Clerk.*
By CHA'S T. REYNOLDS,
Deputy Clerk.

Levy.

$4,954	93	damages.
52	00	clerk's costs.
42	55	sheriff's do.
61	45	" accruing costs.
248	00	plaintiff's witnesses.
$5,358	93	
330	00	credit by sale.
$5,028	93	balance due and interest.

On the 7th day of February, A. D. 1871, the sheriff made a levy under foregoing execution, which is in words and figures following, to wit:

By virtue of the within execution, on this 7th day of February, 1871, in Lewis and Clarke County, Montana Territory, I have levied upon all the right, title, and interest that B. C. and C. S. Kintzing have in and to the following-described property, to wit:

4 bbls. sherry.
6 " Port wine.
5 " Ry. gin.
2 " pure Jama'ca rum.
1 " old " "
2 Ⓗ sherry.
2 bbls. Port wine.
1 " ⅛ cask S. H. & C. brandy.
1 bbl. New Bedford rum.
1 " whiskey (part full) (not sold.)
1 " Brown sherry.

W. L. STEELE, *Sheriff*,
By WES. ALEXANDER,
Under Sheriff.

29 On the 4th day of April, A. D. 1871, the sheriff made return on said foregoing execution, which is in the words and figures, to wit:

Accruing costs and disbursements.

Levy, 1.25; notice of sale, 4.00; mileage, 1.20; entry, 50	6 95
Commission on $500, 6	30 00
Commission " 500.00, 5	25 00
Do. " 390.25, 2½	9 75
Measuring liquors	5 00
Paid guager	2 00
" Messrs. Booker & Roberts	133 00
	$211 70
Amount paid plaintiff	1,061 18
" " clerk	42 00
" " Booker & Roberts	133 00
" " printer	20 00
" applied to sheriff's costs	134 10
	1,390 28
Amount of sale	1,390 28

Ballance due on within execution thirty-nine hundred and sixty-seven & $\frac{75}{100}$ dollars, besides interest from date of judgment.

W. L. STEELE, *Sheriff*,
By WES. ALEXANDER, *Under Sheriff*.

Dated April 4th, 1871.

Received on the within execution, to apply on judgment, the sum of $1,961.18, from W. L. Steele, sheriff.

Dated February 14th, 1871.

CHUMASERO & CHADWICK,
Plaintiff's Attorneys.

Filed April 4th, 1871.

SCRIBNER, *Clerk.*
REYNOLDS, *Deputy Clerk.*

30 To each and every one of which, when offered, were objected to by defendants; said objection overruled; said evidence admitted, and exceptions duly taken by defendants at the time.

And, after the introduction of said evidence, plaintiff, to further sustain the issues on his part, was inquired of "as to the value of said property replevied in case number 1038." To said inquiry into the question of value defendants then and there objected at the time; which objection was overruled; and to which ruling defendants then and there excepted.

And afterwards, under the ruling of the court, said plaintiff testified, in substance, "that said property was of the value, at the time it was replevied, of ten thousand dollars;" to the admission of which said evidence the defendant then and there duly excepted.

Plaintiff then introduced as witnesses A. G. Lowery, John McCormick, W. A. Rumsey, and L. C. Miller, who also were inquired of "as to the value of said property at the time the same was replevied in case number 1038;" to which defendants, at the time such inquiry was made, then and there objected; which objection was overruled; and to which ruling defendant then and there duly excepted:

Whereupon, under the ruling of the court, said witnesses, respectively, testified "that said property was of about the value of seven or eight thousand dollars."

31 To which said evidence, and the admission thereof, defendants then and there excepted.

Here plaintiff rested his case.

And afterwards, to wit, defendants, by leave of the court, filed their motion for a non-suit; which motion was in the words and figures following, to wit:

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

In the district court, 3rd judicial district, in and for the county and Territory aforesaid.

JOSEPH A. LOMME, PLAINTIFF,
vs.
JOHN M. SWEENEY AND ANTON M. HOLTER,
defendants.

Now come the defendants in the above-entitled cause, and move the court to grant a non-suit herein for the following causes and reasons, to wit:

1st. Said plaintiff has failed to prove a sufficient case for the jury.

2nd. The verdict and judgment introduced in case number 1038 shows that said defendants are not liable upon the undertaking sued on.

3rd. Said verdict, judgment, and evidence in the cause shows that the plaintiff has no right to maintain this action in his own name.

4th. The evidence shows that said plaintiff is not the lawful owner or holder of the undertaking sued on, and that he has no interest therein.

5th. The evidence does not show that said B. C. and Charles
32 S. Kintzing had any attachable interest in said property.

6th. There is no evidence showing the extent or value of said Kintzings, or either of their interests in said property, so as that a jury could arrive at the damage, if any sustained, upon the undertaking sued on.

7th. The evidence does not show that any writ returno habendo was ever issued or returned in case number 1038, in which the undertaking sued upon was given.

8th. The evidence does not show that the proper execution in case number 1038 was ever issued or returned.

9th. The evidence does not show that any demand was ever made of the defendants for return of the property or return of the value thereof.

10th. The evidence does not show that the undertaking sued on was ever assigned or delivered to the plaintiff, or any one for him.

11th. There is no evidence showing that the indemnity undertaking in the attachment suit was ever executed to the sheriff, as required by law.

12th. Said evidence is, in other respects, insufficient to support a verdict for plaintiff.

SHOBER, TOOLE & TOOLE,
Attorneys for Defendants.

Which said motion, being taken up and considered by the court, was overruled; which ruling was by a written opinion of said court, which is in words and figures following to wit:

33 JOSEPH A. LOMME *vs.* SWEENEY & HOLTER. } Motion for non suit.

Opinion of court.

There are three questions presented by this motion.

1st. Has Lomme the right to sue upon this undertaking, and is he a proper plaintiff in a suit against these defendants as sureties upon such undertaking?

2nd. Was the judgment in the case of Watson vs. Roberts a valid judgment, whereby the liability of the sureties became fixed?

3rd. Was it necessary that a writ for the return of the property issue before the commencement of this action.

1st. The sheriff serves an attachment and seizes the property of Kintzing & Co. to satisfy a debt of Lomme. How does he hold the property thus seized? He holds it for the sole benefit of Lomme, as an agent or servant of his. He, the sheriff, has no interest in the property himself, and when it is taken from the sheriff at the suit of a third person, who is damaged thereby? Lomme, and not the sheriff. And when a bond

is executed for the return of the property, if return thereof be adjudged, for whose benefit is the bond given? For Lomme, and not the sheriff. Who, then, has a beneficial interest in the bond or undertaking? Most certainly the person for whose sole benefit the bond was taken. When Watson came with an officer and demanded the property the sheriff
34 could well say: This is not my property, and I have no interest in it, and if you take it, you must secure the person for whom I hold it; and this is what the statute contemplates in requiring an undertaking to be given. The sheriff is a ministerial officer, and his whole duty is discharged when he takes the bond required by law, and is responsible only to see that the sureties are sufficient. He holds the property attached in trust for the benefit of the attaching creditor, and when the property is replevied at the suit of a third person, he is responsible only to see that a good and sufficient undertaking is given to secure a return of the property, if a return thereof be adjudged. Who, then, should bring suit on this undertaking? Under the 4th section of our code which provides that "every action shall be prosecuted in the name of the real party in interest," there seems to be no doubt that Lomme, the plaintiff in the original attachment suit, is the only person who could maintain an action on this bond or undertaking. Must Lomme sue the sheriff on the undertaking, the same having been given nominally to him and in his name, thereby requiring the sheriff to prosecute the sureties? It is not believed that, under the section of the code above referred to, any such suit could be maintained.

2nd. Is the judgment valid?

The suit of Watson against the sheriff was prosecuted, and resulted in a verdict for the defendant, and upon the verdict a judgment
35 was rendered that the property be returned, and for costs. Objection is taken to this judgment, that it is not in the ultimative, and that after adjudging a return of the property, it does not fix the value thereof, and a judgment for the value in case a return cannot be had, and that for this defect the sureties on the undertaking are discharged. Our code provides as follows: "If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same." This provision is a transcript of the New York code, from whence it was borrowed. In the undertaking sued on, the sureties bound themselves to return the property if a return thereof be adjudged, and for such damages and costs as might be awarded. This brings us to an inquiry into the nature and object of a suit in replevin. The primary purpose of an action in replevin is to recover the possession of specific articles of personal property. This was its purpose and object under the old forms of practice, while an action in trover was to recover the value and not the property itself. Our code, while not undertaking to abolish the great principles that govern and control these actions, seems to have authorized their being joined in one suit, so that a party can now bring his action in replevin for the
36 recovery of personal property, and at the same time can have adjudgment for its value, if a return cannot be had. But if the judgment simply awards a return of the property, and for damages and costs, and fails to assess the value of the property, and to give judgment for value thereof, in case a return cannot be had, is the judgment thereby rendered void?

The authorities relied upon in the 9th New York Reports, (page 470,) and 27th New York Reports, (page 324,) to invalidate this judgment, are

not in point, for in those cases there was simply a judgment for the value of the property, and did not give to the plaintiff the right which he most clearly has to return the property if a return be adjudged. The object of the suit is for a return of the property, and a judgment that should deny the right and privilege of making a return would be clearly erroneous, and the cases referred to only decide this point. The case of Niccerson vs. Chatterton, (7th California, page 568,) comes squarely up to the doctrine, that the judgment must be for a return of the property, and for its value in case a return cannot be had. The reasoning upon which this decision is founded is not satisfactory; and although reluctantly followed in the 24th Cal., (page 147,) it is safe to say that it was affirmed because the parties might be supposed to have contracted with reference to it, and because they felt bound to follow an established precedent, and not from the reason of the decision itself.

37 It must be borne in mind that this undertaking is for a return of the property, if return be adjudged. This is its primary object and purpose; and upon at rial, return having been adjudged, and no return having been made in pursuance thereof, is not the condition of the undertaking violated, and the liability of the sureties thereby fixed?

This case is presented: Lomme, the plaintiff, commences a suit in attachment against Kintzing & Co., levies upon property, and thereby secures his debt. Watson claims the property attached, and replevies it, and causes the undertaking in the case at bar to be given. The replevin suit is tried, and it is found that Watson has no interest in the property, but has taken it into his possession; a return thereof is adjudged, and he fails to return it. Can his sureties on the undertaking escape the consequences of his default? Can the rights of an attaching creditor who has secured his debt by his vigilance and care be thus destroyed by the unfounded claim of a stranger who has no interest in the property, simply because the judgment does not fix the value of the property? The wrong-doer has the property in his possession; judgment for the return has been lawfully given, and these sureties have promised and contracted that this judgment should be performed, and the default of their principal creates a breach of their undertaking, and their

38 liability at that moment takes place. The lease in the 26th Indiana, page 504, under a provision precisely similar to that contained in our code sustains a judgment for the return of the property where no judgment for the value is given, and seems to be in point to sustain the judgment under consideration; and it seems to be sustained by more satisfactory reasoning than the case of Nickerson vs. Chatterton. (7 Cal., page 568.) Again, why do these sureties complain that there is not a judgment for the value of the property? How are they injured because this judgment was not given? What right have they to complain that the judgment against Watson does not go to the extent that it might have gone, thereby increasing their liability? In thus complaining they stand in precisely the same situation as a defendant would in asking to have a judgment against him set aside because it was not large enough. If Lomme was thus complaining, it would seem more reasonable; but it is a strange position for sureties to assume to ask that the judgment against their principal be set aside because it was not large enough. The judgment is exactly what the sureties promised to see performed, return the property, and in not assessing the value of the property and rendering a judgment therefor, it is so far in their favor, and in thus failing to value the property, the sureties are not injured.

3rd. No execution for a return of the property has been issued. This leads to the inquiry, when does the liability of the sureties become fixed? An inspection of the undertaking will show that the sureties promised to cause the property to be returned, if return thereof be adjudged.
39 Their liability is fixed when the judgment is rendered. It is their duty to see that the property is returned, and for this purpose they could have an execution issue for the return, and failing to do this, their liability at once is determined. It thus seems that there is no objection in submitting to this jury that which was left undone by the jury in the case of Watson against the sheriff, viz, the valuation of the property; and as to this value, Lomme has the right to be placed in the same position as before the suit of Watson was commenced. The sureties promised to this effect, and even if Kintzing & Co. had no interest in the property, this does not change the right; the sureties have promised to return the property; and if Kintzing & Co. had not even an attachable interest therein, they are liable for the full value of the property to the amount of their undertaking if they fail to perform their promise.

The motion for non-suit is overruled.

To which said ruling the defendants then and there duly excepted at the time.

And afterwards defendants filed their motion to strike out portions of the testimony in this cause; which said motion was in words and figures as follows, to wit:

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:
In the district court, 3rd judicial district in and for the county and Territory aforesaid.

40 JOSEPH A. LOMME
vs.
J. M. SWEENY AND A. M. HOLTER.

Now comes the defendants and move the court to strike out all the evidence of witnesses in this cause touching the value of the property in dispute, for the following causes and reasons, to wit:

1st. Said evidence is irrelevant and immaterial.

2nd. The pleadings, undertakings, &c., in cause No. 1038, fix and limit the liability of defendants as to the question of value.

3rd. The judgment in case No. 1038 only shows that defendant Roberts was entitled to the possession of said property, leaving the question as to the extent and value of the interest of Kintzings the only proper subject of inquiry so far as damages for a failure to return said property is concerned.

4th. Said evidence is in other respects irrelevant and inadmissable.

SHOBER, TOOLE & TOOLE,
Attorneys for Defendants.

Which motion being taken up and considered by the court was overruled; to which ruling defendants then and there duly excepted.

And afterwards, by leave of the court first had and obtained, defends ants filed the following amendments to their answer, which is in word- and figures following, to wit:

41 JOSEPH A. LOMME, PLAINTIFF,
vs.
JOHM M. SWEENY AND ANTON M. Holter, def'ts.

District court, 3rd judicial district, in and for Lewis and Clarke County, Montana Territory.

Now comes the defendants, and, by leave of the court first had and obtained, and file this their amendment to their answer herein, to wit: Insert after words and figures 1867, on 29th line, page 2, of the original answer, "defendants deny that 10½ casks of brandy, a portion of said property, was not returned to the sheriff, and they therefore deny that no part of said property was returned."

TERRITORY OF MONTANA,
County of Lewis and Clarke, ss:

John H. Shober makes oath and says that he is one of the attorneys in the foregoing entitled cause, and has heard the foregoing amendments to the answer herein read, and knows the contents thereof; and that he has reason to believe and does believe the matter therein stated, and the matters stated in the original answer so amended, to be true.

J. H. SHOBER.

Subscribed & sworn to before me this 9th day of November, 1871.

H. S. WADE, *Clerk.*

Defendant, in order to support the issues on their part, introduced W. K. Roberts as a witness, who testified that all the property levied on by him in case number 1037, as sheriff, was replevied in case number 1038. Defendants then offered to prove by said witnesses
42 the value of the property replevied at the time the execution in case number 1037 was issued or reached his hands. Which evidence was objected to as immaterial. Said objection was sustained and said evidence rejected. To all of which defendants then and there daly excepted.

Here defendants offered to introduce instructions of court given in case number 1038, of which the following is a copy, to wit:

In 3rd judicial district court, Lewis and Clarke County, Montana Territory.

W. S. WATSON
vs.
W. K. ROBERTS.

The plaintiff requests the court to instruct the jury as follows:

1st. If the jury believe, from the evidence, that W. S. Watson was the owner of the goods, wares, and merchandise claimed by him at the time of the commencement of this action, and entitled to the possession thereof, and that the defendant took possession of the same without the consent of the said plaintiff, then you will find for the plaintiff, and assess such damages as he has proven he sustained in consequence of being deprived of the possession of said goods by said defendant, not exceeding the sum of five hundred dollars. (Given.)

2. That the bill of sale introduced in evidence in this cause is presumed in law to be given in good faith for the purposes therein mentioned. (Given.)

43 3rd. If the jury, find from the evidence, that plaintiff in this action purchased the interest of Charles S. Kintzing in the goods in controversy in good faith, and that he had the actual possession thereof under such sale at the time the attachment was levied, you will find for the plaintiff. (Given.)

4th. That the jury are the judges of the credibility of witnesses, and if a witness has sworn falsely in one particular, the jury are at liberty to disregard his evidence in every particular. (Given.)

5th. Even if the jury shall believe, from the evidence, that B. C. Kintzing or Charles S. Kintzing sold out their interest in the goods in controversy for the purpose of hindering, delaying, or defrauding their creditors, yet such intent can in nowise affect the title to said goods, unless the jury further find that said plaintiff was privy to such intent, and purchased said goods with the knowledge of such intent. (Given.)

6. Fraud is never presumed, but must be proven. The law presumes every conveyance to be made in good faith until the contrary is proven. (Given.)

7. The law does not require that a sale of personal property shall be recorded; and if the sale was accompanied by delivery of possession, the same is valid without the record of the bill of sale. (Given.)

The execution of promissory notes for the purchase-price of property is in law as good a consideration to support the conveyance of the same as the payment of money. (Given.)

A change of possession is a fact to be proven as any other fact. If it was evident, after the sale from B. C. Kintzing to Watson, that

44 Kintzing had ceased to be owner of any interest in the goods and merchandize conveyed, and that W. S. Watson was the owner thereof and exercised exclusive control as such, having hired new clerks and opened a new set of books from the date of said sale, the simple fact that for a short time afterwards B. C. Kintzing may have slept in the store or rendered occasional assistance in carrying on the same, or remained about the store, cannot affect the validity of his transfer. (Given.)

W. S. WATSON
vs.
W. K. ROBERTS.

The defendant asks the court to instruct the jury as follows:

1st. That the plaintiff can only recover on the strength of his own title; and that, to entitle him to a verdict, the jury must be satisfied from the evidence that, at the time of the levying of the attachment by the defendant, the plaintiff was the bona-fide owner, and in the actual and exclusive possession of the property in dispute. (Given.)

2nd. That if the jury believe, from the evidence, that the alleged purchase from C. S. Kintzing, by the plaintiff, of his interest in the goods and stock of B. C. Kintzing & Co. was made for the purpose of covering and concealing the property of Kintzing from his creditors, that no title passed to plaintiff if he knew, and he cannot recover. (Given.)

3rd. Fraud is a question for the jury to determine from the evidence and all of the facts and circumstances in evidence; and if they

45 believe, from the evidence, that there was any fraud intended against creditors in either of the alleged sales of B. C. Kintzing

or C. S. Kintzing to Watson, that would invalidate such alleged sales, and they would be void as to creditors of the Kintzings, and no title to the property would thereby pass as against the creditors of Kintzing, and they must find for the defendant. (Given.)

4th. That as sale made by a vender of goods and chattels, and every assignment of goods and chattels, unless the same be accompanied by immediate delivery, and followed by an actual and continued change of possession of the goods sold and assigned, is conclusive evidence of fraud as against the creditors of the seller or the person making the assignment; and if the jury believe, from the evidence, that the Kintzings sold the goods in controversy to Watson, and that there was not an immediate delivery and a continued change of possession of the goods, and that Lomme, the person suing out the attachment set up in the answer of defendant was at the time a creditor of Kintzing, they will find for the defendant. (Given.)

5. That the jury are the sole judges of the fact whether such sales were or were not intended to be in fraud of the creditors of the Kintzings. (Given.)

6th. The jury are judges of the credibility of witnesses; and where there is a conflict in the testimony, it is for them to say which of the witnesses are most worthy of credit; and, in arriving at a conclusion, they will take into consideration the motives of the witnesses and their bearing and appearance on the witness stand. (Given.)

46 7. It is not necessary that fraud should be conclusively proved, but it is to be judged of as any other fact susceptible of proof, and may be proved by circumstances. (Given.)

8. In determining the question of fraud the jury should take into consideration the pecuniary condition of the seller and purchaser of the property and the peculiarities attending the sale, the acts of the seller in regard to the property subsequent to the alleged sale, and the secrecy and silence of the purchaser for a long time after the purchase. (Given.)

9. That the sale by a vendor in failing circumstances, and the purchase from him by one knowing of such circumstances at a greatly inadequate price, is a fraud on the creditors, from which a jury may infer that fraud was the design of both parties to the sale. (Given.)

10. That the sale of goods already in the market, on long credit, is a frequent badge of fraud, and is a circumstance which, if proven, the jury should consider in arriving at a conclusion herein. (Given.)

11th. If there was a fraud intended to be perpret'ated by Watson and the Kintzings, or by Watson and either of the Kintzings, no ingenuity by which it has been covered up should avail to allow them to succeed. (Given.)

12. Where a party owes a debt, and has property liable for its satisfaction in the jurisdiction, and sells or withdraws it from the jurisdiction, he thereby hinders and delays his creditors. If such was the design of him and his vendee, the sale is void as against such creditors. (Given.)

47 13. When a debtor becomes insolvent his property, in equity and justice, belongs to his creditors, and not to him, and thenceforth the object and aim of the law is to give it to his creditors. (Given.)

14. The interest of the debtor then is to see that his property is not wasted or sacrificed; but this interest is subordinate to those of his creditors, whose right it is to have the property so applied without hindrance or delay. (Given.)

15. The ground on which sales on long credit are held to be badges of fraud is, that it gives the debtor the power to dictate to the creditor how

long he shall wait for his pay, and whose promissory notes are given, it puts the debtor's assets in such a shape that he may easily conceal them. (Given.)

16. In inquiring whether Watson and the Kintzings intended to cheat, hinder, delay, or defraud the creditors of the Kintzings, you are instructed that the law holds that all men intend to do what their deliberate conduct plainly, distinctly, and inevitably tends to accomplish. (Given.)

17. If the Kintzings, or either of them, were owners of an interest in these goods at the time of the levy of the attachment, you will find for the defendant. (Given.)

Which said instructions were rejected, and not allowed to be introduced; to which ruling of the court defendants then and there excepted.

And defendants, to further support the issues on their part, offered to introduce complaint and answers in case number 1037, together
48 with certificate of adjudication in bankruptcy referred to in said answers, of which the following are copies, to wit:

In district court, county of Lewis & Clarke, Territory of Montana, third judicial district.

JOSEPH A. LOMME
vs.
B. C. KINTZING AND CHARLES S. KINTZING.

Now comes the above-named plaintiff, by his attorneys, Chumasero & Chadwick, and complains of the above-named defendants, and, for cause of complaint, alleges—

That, on the first day of July, A. D. 1869, the said defendants were co-partners, doing business at the town of Helena, county and Territory aforesaid, under the firm-name and style of B. C. Kintzing & Co.; that, on the day and year aforesaid, the said defendants, co-partners as aforesaid, were indebted unto this plaintiff in the sum of four thousand three hundred eighty-four and $\frac{89}{100}$ dollars, ballance due for money lent and advanced by plaintiff to the defendants, and for money had and received by the said defendants for the use and benefit of this plaintiff, for goods and wares and merchandise sold and delivered by plaintiff to the said defendants, and for work, labor, and service done and performed by the said plaintiff for said defendants, all at the special instance and request of the said defendants, which said sum of four thousand three hundred eighty-four & $\frac{89}{100}$ dollars the said defendants, on the day and year
49 aforesaid, promised to pay the said plaintiff when thereto requested by the said plaintiff; that the said plaintiff has demanded payment of the said sum of the defendants; that the defendants, or either of them, have not paid the said sum or any portion thereof, and the same remains wholly due and unpaid.

Wherefore the said plaintiff prays judgment against the said defendants for the sum of forty-three hundred eighty-four and $\frac{89}{100}$ dollars, together with the legal interest thereon from the said 1st day of July, A. D. 1869, with costs of action.

CHUMASERO & CHADWICK,
Plaintiff's Attorneys.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss :

Joseph A. Lomme, being first duly sworn, says that he is the plaintiff named in the foregoing complaint; that he has heard the same read, and knows the contents thereof; that the same is true, of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true, and has reason so to believe.

J. A. LOMME.

Subscribed & sworn to before me this 11th day of October, A. D. 1869.

W. F. CHADWICK,
Notary Public.

To which complaint the defendant B. C. Kintzing filed herein his answer on the 27th day of October, A. D. 1869, which is in the words and figures following, to wit:

50 In the district court, county of Lewis & Clarke, Territory of Montana, third judicial district.

JOSEPH A. LOMME, PLAINTIFF,
vs.
B. C. KINTZING AND CHARLES S. KINTZING, defendants.

Now comes the defendant B. C. Kintzing, by his attorneys, Woolfolk & Toole, and, for answer to the complaint of the plaintiff—

Denies that, on the 1st day of July, A. D. 1869, this defendant and Charles S. Kintzing were co-partners, doing business in the town of Helena, county and Territory aforesaid, under the firm-name and style of B. C. Kintzing and Company; denies that, on the day and year aforesaid, this defendant, as co-partner with Charles S. Kintzing, or otherwise, was indebted unto the plaintiff in the sum of four thousand three hundred and eighty-four $\frac{89}{100}$ dollars, or any other sum, for money had or received by this defendant for the use and benefit of the plaintiff, or for goods, wares, or merchandise sold or delivered by plaintiff to this defendant, or for work, labor, or services done or performed by the said plaintiff for said defendant; denies that this defendant, on the said first day of July, A. D. 1869, or at any other time, promised to pay the said plaintiff the sum of four thousand three hundred and eighty-four $\frac{89}{100}$ dollars, or any other sum, when thereto requested by the said plaintiff; denies that plaintiff has demanded payment of the said sum of
51 this defendant; denies that the said sum of four thousand three hundred and eighty-four $\frac{89}{100}$ dollars, or any other sum, remains due from this defendant to the plaintiff.

WOOLFOLK & TOOLE,
Attorneys for Defendant Kintzing.

B. C. Kintzing, being first duly sworn, deposes and says that he is one of the defendants in the above cause; that he has heard the foregoing answer read, and knows the contents thereof; and that he has good reason to believe, and does believe, that the matters therein stated are true.

B. C. KINTZING.

Subscribed & sworn to before me this 26th day of October, A. D. 1869.

[SEAL.] MASSENA BULLARD,
Notary Public.

On the 30th day of March, A. D. 1870, Charles S. Kintzing filed herein his answer to the above complaint, which is in the words and figures following, to wit:

In the territorial district court, 3rd judicial district, Lewis and Clarke County, Territory of Montana.

JOSEPH A. LOMME, PLAINTIFF,
vs.
B. C. KINTZING AND CHARLES S. KINTZING, defendants.

Now comes Charles S. Kintzing, by his attorneys, Woolfolk and Toole, and, for separate answer to the complaint of the plaintiff,
52 admits that he was a member of the firm of Kintzing & Co., and that he was the owner of the entire capital stock of said firm, and solely responsible for the debts thereof, including any indebtedness due to the plaintiff herein; that B. C. Kintzing had only an interest in the profits of said business, and no interest whatever in the capital stock of said firm of B. C. Kintzing & Company.

This defendant, for further answer to the complaint of the plaintiff, states that, on the 8th day of December, A. D. 1869, in the district court of the United States in and for the eastern district of Missouri, he was duly adjudged a bankrupt under a petition filed in said court on the 17th day of September, A. D. 1869, said proceedings being had in pursuance of an act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2nd, 1867.

Wherefore this defendant prays that all proceedings herein be suspended, in conformity with said act, to await the determination of said court of bankruptcy on the question of the discharge of this defendant.

WOOLFOLK & TOOLE,
Attorneys for Defendant.

Alexander M. Woolfolk, being first duly sworn, deposes and says that he is one of the attorneys for the above defendant, who is a non-resident of this Territory; that he is familiar with the facts stated in the above plea or answer; and that he has good reason to believe, and does believe, the matters and facts therein stated to be true.
53 ALEX. M. WOOLFOLK.

Subscribed & sworn to before me this 30th day of March, A. D. 1870.
CHA'S W. FOWLER, *Clerk*,
By CHA'S G. REYNOLDS, *D. C.*

On the 26th day of October, A. D. 1870, B. C. Kintzing filed herein his amended answer to the complaint herein, which is in words and figures, to wit:

In the district court, county of Lewis & Clarke, 3rd judicial district, Montana Territory.

JOSEPH A. LOMME
vs
B. C. KINTZING AND CHARLES S. KINTZING.

Now comes B. C. Kintzing, by his attorneys, Woolfolk & Toole, and, for seperate and supplemental answer to the complaint of the plaintiff, filed by leave of the court, denies that, on the first day of July, A. D. 1869, or at any other time, the defendants were partners in the town of Helena and Territory of Montana, under the firm-name and style of B. C. Kintzing & Co.

Denies that, on the day and year aforesaid, or at any other time, the said defendants as such co-partners were indebted to the plaintiff in the sum of four thousand three hundred and eighty-four $\frac{89}{100}$ dollars, or any other sum, for money lent and advanced by plaintiff to defendants;
54 for money had and received by defendants for the use and benefit of plaintiff; for goods, wares, and merchandise sold and delivered by plaintiff to defendants, and for work, labor, and services done and performed by plaintiff for said defendants, at their special instance and request, as charged in plaintiff's complaint.

Denies that this defendant ever promised to pay plaintiff the said sum of four thousand three hundred and eighty-four $\frac{89}{100}$ dollars, or any other sum; denies that plaintiff ever demanded payment of said amount of money from this defendant; denies that said amount, or any other sum, remains due and unpaid to plaintiff. Defendant, for further answer to the complaint of the plaintiff, admits that, for a short time in the spring of 1869, the above defendants were associated in business in the town of Helena and Territory of Montana, under the name and style of B. C. Kintzing & Co., but avers that this defendant had no interest whatever in the capital stock of said business; but only received a salary for services rendred equal to one-third of the profits of the business of said B. C. Kintzing & Company; that Charles S. Kintzing owned the entire capital stock in said business, and was solely liable for the debts incurred in said business by B. C. Kintzing & Co., under his agreement with this defendant; and that plaintiff had full knowledge of the extent of this defendant's interest and liability as aforesaid while in the employment of B. C. Kintzing & Co. This defendant, for further answer to
55 plaintiff's complaint, states that Charles S. Kintzing his co-defendant aforesaid, has, since the institution of this suit, been adjudged a bankrupt under and by virtue of the provisions of an act entitled "An act to establish a uniform system of bankruptcy throughout the United States," the proceedings under said act having been had in the city of St. Louis and State of Missouri. Wherefore this defendant denies the right of plaintiff to prosecute this action, and asks to be discharged with his costs in this behalf expended.

WOOLFOLK & TOOLE,
Attys. for B. C. Kintzing.

Alexander M. Woolfolk, being first duly sworn, states that he is one of the attorneys for the above-named B. C. Kintzing, and that he has good reason to believe that the matters and facts therein stated are true.

ALEX. M. WOOLFOLK.

Subscribed and sworn to before me this 26th day of October, A. D. 1870.

CHARLES W. FOWLER, *Clerk.*
CHA'S G. REYNOLDS, *D. C.*

In the district court of the United States for the eastern district of Missouri.

IN THE MATTER OF CHARLES S. KINTZING, BANKRUPT. } In bankruptcy. No. 769.

At St. Louis, in said district, Wednesday, 8th December, A. D. 1868.

This day come the petitioning creditors herein, and the said
56 Charles S. Kintzing, by the respective attorneys, and said petitioning creditors, by their attorney, move the court for judgment on the amended answer of said Kintzing, filed herein; and the court being of opinion that the first act of bankruptcy, alleged in the petition against the said Kintzing herein, to wit: that within the six calender months next preceding the date of said petition, and within said district, he, the said Charles S. Kintzing, being a merchant and trader, did, on the 18th day of August, A. D. 1869, suspend and did not resume payment of his commercial paper within a period of fourteen days, stands admitted on the pleadings herein. It is therefore adjudged that the said Charles S. Kintzing became a bankrupt within the true intent and meaning of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, before the filing of said petition, and he is therefore declared and adjudged a bankrupt accordingly.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, Joseph H. Clark, clerk of the district court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto annexed to be a true copy of adjudication in bankruptcy in the matter of Charles S. Kintzing, bankrupt, in bankruptcy, as fully as the same remains of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district,
57 this sixteenth day of October, in the year of our Lord eighteen hundred and seventy-one.

[SEAL OF SAID COURT.] JOSEPH H. CLARK,
Clerk of said Court.

Which offer was rejected by the court, and said evidence not admitted; to which said ruling defendants then and there duly excepted.

Defendants then offered to introduce and read in evidence certain depositions and other evidence for the purpose of showing that the said Charles S. Kintzing had been adjudicated a bankrupt before the rendition of the judgment in case No. 1037, and that the same was pleaded by him in said cause; which was objected to as immaterial and irrelevant; said objection sustained, and said evidence excluded, to which defendants then and there duly excepted.

Defendants then offered to prove by competent witnesses that said Charles S. Kintzing was the only party that had an attachable interest in the property replevied, and the extent of such interest; which said

evidence was objected to as immaterial and inadmissable; and the court rejected said evidence and sustained the objection; to which ruling defendants then and there duly excepted.

Defendants then offered, by competent witnesses, to prove that the said B. C. & C'arles S. Kintzing, defendants in case No. 1037, had but a small attachable interest in the property levied on in said cause,
58 No. 1037, and replevied in case No. 1037, and that such interest was of but little value, which said evidence was objected to as immaterial and inadmissable; said objection sustained by the court, and said evidence excluded by the court; to each and all of which the defendants then and there duly excepted.

Here the said defendants closed, and said cause submitted to the jury upon the following instructions on the part of the plaintiff, which are in the words and figures following, to wit:

"The court instructs the jury that if they believe, from the evidence, that, under and by virtue of a writ of attachment issued out of the 3d judicial district court in and for Lewis and Clarke County, in an action wherein Joseph A. Lomme was plaintiff, and B. C Kintzing and C. S. Kintzing were defendants, W. K. Roberts, the sheriff of the county, levied upon and seized the property in the complaint in this cause mentioned as the property of B. C. and C. S. Kintzing, and that thereafter one W. S. Watson claimed and brought an action in said court to recover possession of said property from said Roberts while so in possession thereof; and that the defendants in this case executed the undertaking sued on and mentioned in the complaint herein, as sureties of said Watson in said action; and that thereupon the coroner of said county took said property from the possession of said Roberts, sheriff aforesaid, and delivered the same to said Watson, and that upon the trial of said action a verdict was found by the jury
59 therein for the defendant Roberts, and that thereupon a judgment was entered for the return of said property to said Roberts; and if they further believe, from the evidence, that, on October 26, 1870, the plaintiff, Lomme, recovered a judgment in said case against said B. C. & C. S. Kintzing, for $4,954.93, upon which an execution issued and was returned unsatisfied, except as to $1,330.00, and that the remainder of said judgment remains unsatisfied; and if they further believe, from the evidence, that said property, or portion thereof, was never returned by said Watson to said sheriff, nor subjected to satisfaction of said judgment in favor of plaintiff, then they should find for the plaintiff, and should assess his damages at such amount as they may find from the evidence remains unsatisfied upon said judgment in favor of plaintiff against said B. C. & C. S. Kintzing, with interest thereon at the rate of ten per cent. per annum, and his costs expended in the action of Watson against Roberts, provided they further find from the evidence that the value of said property delivered to said Watson, as aforesaid, at the time the same was so delivered, and which they may find from the evidence was not returned to said Roberts, and applied to satisfaction of said judgment in favor of plaintiff, or placed in subjection to said judgment, was equal to said balance of said judgment, and the amount of said costs; and if not equal thereto, then they should assess plaintiff damages at the amount they find from the evidence said property was worth at the time of the delivery thereof to said Watson, and the amount of his costs in said action of Watson
60 against Roberts, with interest on such amounts at the rate of ten per cent. per annum. Given.

The court further instructs the jury that it is admitted by the pleadings in this action that W. K. Roberts, sheriff of said Lewis and Clarke County, did levy upon and seize the property in the complaint mentioned as the property of B. C. & C. S. Kintzing, under a writ of attachment in favor of plaintiff, Lomme, against said B. C. & C. S. Kintzing; and that in an action brought by one W. S. Watson to recover possession thereof, the defendants in this action executed the undertaking mentioned in the complaint, and on which this suit is brought, and that possession of said property was delivered to said Watson in said action by virtue of said undertaking, and that the plaintiff recovered judgment in said action against said B. C. & C. S. Kintzing for $4,954.53, and that an execution issued upon said judgment which was returned unsatisfied except as to $1,330.00, and that the remainder thereof is unsatisfied; and that the amount of costs paid by plaintiff in the action of Watson against Roberts was $340.45; and the only questions for the jury to determine are, whether possession of said property so delivered to said Watson was ever returned to said Roberts, and to determine the value of said property so delivered to said Watson, and not so returned. But the defendants are in no case liable beyond the amount of their bond or undertaking. Given.

61 The jury are instructed that the agreement of the parties to this suit made in open court, and in their presence, to the effect that the property mentioned by witness Roberts as having been taken under the execution in favor of Lomme vs. Kintzing, with the exception of 10⅛ casks of Vinter brandy, was applied upon the execution and included in the amount alleged in the complaint to have been collected on said judgment, is to be taken as proved by evidence; and the court instructs the jury further that, as to the said 10⅛ casks of brandy, the jury are not to consider them in assessing the value of the property replevied, but are only to assess the value of the property which they believe from the evidence was not taken on the execution or returned by Watson or the defendant's in his suit. Given.

The jury are instructed that if they believe, from the evidence, that a portion of the property replevied was actually taken by the sheriff on execution in favor of Lomme vs. Kintzings, and a portion of it applied in satisfaction of Lomme against them, and that a portion of the property so taken was not so applied in satisfaction of the debts of said Lomme on account of any act of W. S. Watson prior to its being so taken, that would not release the sureties in the replevin bond from either their obligations to return the ballance of such property not taken by such sheriff; and they must find for the plaintiff for the amount actually due and unpaid on his claim against said Watson, as shown by the

62 pleadings and evidence, provided the value thereof do not exceed the amount so due to said Lomme. Given.

The 10⅛ casks of brandy is in no manner to reduce the judgment of Lomme vs. Kintzing & Co.; but if this brandy was returned to the sheriff, the sureties on the undertaking are, to the extent of the value of such brandy, discharged.

In 3d judicial district court, Lewis & Clarke County, Montana Territory.

JOSEPH A. LOMME
vs.
JOHN M. SWEENEY AND ANTON M. HOLTER.

The defendant requests the court to instruct the jury as follows:

1st. That, before the defendants are liable on the undertaking in this

case, it is necessary for the plaintiff to prove that a demand was made upon the sureties for the return of the property claimed in suit No. 1038, in which the undertaking sued on was given; and if he has failed so to do, you should find for the defendants. Refused.

2. That the only interest plaintiff could or can claim in the goods sought to be replevied in the suit of Watson against Roberts, in which the undertaking sued upon was given, is just the interest the
63 Kintzings had at the time of the levy of the attachment on said goods, and he can recover no greater amount of defendants in this action than the value of Kintzing's interest in said goods at said time if he recovered at all. Refused.

3. That the judgment of the court in case No. 1037, in which the undertaking sued upon was given, only establishes the fact that said Kintzings, or one of them, had an attachable interest in said property; and it devolves upon plaintiff in this case to show the extent or value of such interest, and if he has failed so to do, you should find for defendants. Refused.

4. In the cause in which the undertaking was given, the complaint alleges, and the answer admits, that the value of the property mentioned in said complaint is of no greater value than the sum of twenty-five hundred dollars, and the plaintiff, in no event, (even should he prove the entire property to belong to the Kintzings, or either of them,) can recover no greater sum for a failure to return said property than $2,500.00; and any amount that plaintiff has realized from the sale of any of the goods for which the suit No. 1038, in which undertaking was given, should be deducted from that amount. Refused.

5th. The plaintiff admits realizing on his judgment vs. Kintzings, from sale of property; about thirteen hundred dollars; and if the
64 jury find, from the evidence, that such amount was realized from the sale by him of a portion of the goods replevied in the case the undertaking sued upon was given, then defendants are in nowise liable for the value of any of said goods so sold by plaintiff, or caused to be sold by plaintiff, (providing the value at the time of sale was the same as when taken in replevin.) Given.

6. Unless the plaintiff has proven to your satisfaction that a writ returno habendo (that is to say, for the return of the property claimed) in complaint has been issued to the proper officer previous to the commencement of this action, then you should find for defendants. Refused.

7. The jury are instructed that the measure of damages, if they find for plaintiff, is only such damages as he sustained in consequence of the property claimed not having been returned to Roberts in the suit in which the undertaking sued upon was given, (which damage is the value of the property at the time it was taken by Watson,) and from such damage you should deduct the value of all property that has since come to his possession, by virtue of the execution in the case of Lomme vs. Kintzing, in which case the property was originally attached, or into the possession of the sheriff of this county, by virtue of said execution. Given.

8. The undertaking sued on in this case fixes the value of the
65 property replevied at the sum of twenty-five hundred dollars at the time the same was replevied, and the complaint and answer in said cause, number 1038, admit and show that said sum was the value of said property, and you cannot fix the value thereof to be any greater sum. Refused.

9. You will credit on the amount of the value of the goods the value

of such portion as was levied on by the sheriff in execution in case of Lomme vs. Kintzing and Company. Given.

10. It devolves upon the plaintiff to prove that he has demanded possession of the property mentioned in the complaint of W. S. Watson, or the defendants, before he is entitled to recover in this action; and if he has failed so to prove, you should find for defendants. Refused.

11. The jury are instructed that the value of the property levied upon by the sheriff, in case of Lomme vs. Kintzing et al., and embraced in the replevin in the case of W. S. Watson vs. Roberts, and not credited on the judgment, is to be credited upon said judgment as to defendants; that is to say, defendants are not liable for any property replevied which has been returned to the sheriff. Given.

And upon the giving, refusing, and modification of said instructions, the parties to this action filed their written stipulation, of which the following is a copy, to wit:

66 JOSEPH A. LOMME, PLAINTIFF,
vs.
JOHN M. SWEENEY AND ANTON M. HOLTER,
defendants.

In the district court, 3rd judicial district, Lewis and Clarke County, Montana Territory.

It is hereby stipulated, by plaintiffs and defendants, that all and each and every instruction offered by defendants and refused by the court, and each and every instruction offered by plaintiff and given by the court, as well as the modification of each and every instruction modified by the court and given as modified, be deemed and considered as properly and duly excepted to by defendants; and that each and all instructions offered and given by the court for defendants, and offered by plaintiff and refused by the court, and every modification thereof by the court, and giving thereof as modified, be deemed duly and properly excepted to by plaintiff.

November 9th, 1871.

CHUMASERO & CHADWICK,
Of Counsel for Plaintiff.
SHOBER & TOOLE & TOOLE,
Attorneys for Defendants.

Defendants therefore pray that this their bill of exceptions be signed, sealed, and made a part of the records in this cause, which is done accordingly.

D. S. WADE, [SEAL.]
Judge 3rd Judicial District, Montana Territory.

67 On the 21st day of November, A. D. 1871, the defendants filed herein thier notice of appeal, which is words and figures following, to wit:

Notice of appeal.

In the 3rd judicial district court, Lewis and Clarke County, Montana Territory.

JOSEPH A. LOMME
vs.
ANTON M. HOLTER AND JOHN M. SWEENEY.

You will please take notice that the defendants in the above-entitled, cause hereby appeals to the supreme court of this Territory from the judgment therein made and entered in the said district court on the 10th day of November, A. D. 1871, in favor of plaintiff and against defendants, and from the whole thereof.

Yours, &c.,

TOOLE & TOOLE,
Counsel for Defendants.

Dated November 21st, 1871.

To the clerk of said court, and Messrs. Chumasero & Chadwick, of counsel for plaintiff & respondent.

Service of a copy had Nov. 21st, 1871.

CHUMASERO & CHADWICK,
Plff's Attorneys.

On the 22nd day of November, A. D. 1871, the defendants filed herein their undertaking on appeal, which is in words and figures following to wit:

68 In 3rd judicial district court, Lewis and Clarke County, Montana Territory.

JOSEPH A. LOMME
vs.
JOHN M. SWEENEY AND ANTON M. HOLTER.

Whereas the defendants in the above action have appealed to the supreme court of the Territory of Montana from a judgment entered against them in said action in said court, in favor of plaintiff in said action, on the day of November, A. D. 1871, for five thousand dollars damages, and dollars costs, and from the whole and every part of said judgment:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, Owen Williams, of Lewis and Clarke County, and Territory aforesaid, and Martin M. Holter, of the same place, do hereby, jointly and severally, undertake and promise, on the part of the appellants, that they will pay all damages and costs which may be awarded against them on the appeal, not exceeding the sum of three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellants are desirous of staying the execution of the judgment so appealed from, we do further, in consideration thereof and of the premises, jointly and severally, undertake and promise, and do acknowledge ourselves further, jointly and severally, bound in the further sum of eleven thousand dollars, (being double the amount named

in said judgment,) that if the said judgment appealed from, or any
69 part thereof, be affirmed, the appellants shall pay the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellants on appeal.

OSCAR WILLIAMS. [SEAL.]
MARTIN M. HOLTER. [SEAL.]

TERRITORY OF MONTANA,
County of Lewis & Clarke:

Owen Williams and Martin M. Holter, the persons named in and who subscribed the foregoing undertaking as sureties thereto, being severally duly sworn, each for himself, says that he is a resident and freeholder of said county and Territory, and is worth the amount specified in said undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

OSCAR WILLIAMS.
MARTIN M. HOLTER.

Subscribed & sworn to before me November 21st, 1871.

HARRY R. COMLEY,
Notary Public, Montana Territory.

I, H. P. Wade, clerk of the 3rd judicial district court of the Territory of Montana, do hereby certify that the foregoing one hundred and one pages, numbered from one to one hundred and one, inclusive, contain a true and correct transcript of the bill of exceptions filed in said district court, in the case of Joseph A. Lomme against John M. Sweeney et al.

70 Witness my hand and the seal of said court, this 18th day of December, A. D. 1871.

[SEAL OF DIS. COURT.]

H. P. WADE. *Clerk,*
By ALEX. H. BEATTIE,
Deputy Clerk.

Filed January 2nd, 1872.

I. R. ALDEN,
Clerk Supreme Court, Montana Territory.

71 In the supreme court of Montana Territory, January term thereof, A. D. 1872.

JOSEPH A. LOMME, PLAINTIFF & RESPONDENT,
against
JOHN M. SWEENEY AND ANTON M. HOLTER,
defendants & appellants.

Be it remembered that, on the second day of January, A. D. 1872, the above-named appellants filed in the office of the clerk of said supreme court the transcript or record of the proceedings had and done in the above-entitled cause in the 3rd judicial district court sitting in and for the county of Lewis and Clarke, in said Territory, on appeal from the judgment rendered in said cause in the said district court.

And afterwards, to wit, on the 8th day of January, A. D. 1872, the said appellants, by their attorneys, Mess'. Shober and Toole, filed herein

in writing their points and authorities, of which, in words and figures, the following is a copy, to wit:

In the supreme court.

JOSEPH A. LOMME, PL'FF & RESPONDENT,
vs.
JOHN M. SWEENEY AND ANTON M. HOLTER,
def'ts & appellants.

72 *Points and authorities of appellants.*

The facts in this case are as follows:

On the 11th day of October, 1869, the plaintiff in this action brought this suit against B. C. Kintzing and Charles S. Kintzing, and on the same day sued out a writ of attachment, which writ was, on that day, levied upon certain personal property in which it was claimed said Kintzing had an attachable interest. No indemnity bond was given to the sheriff, but he proceeded to levy upon property in the possession of one W. S. Watson.

On the 12th day of October, 1869, the said W. S. Watson brought his action of replevin against W. K. Roberts (treating him as a trespasser) for the recovery of the possession of said property. Said Roberts, in answer to said action, justified such levy under said writ of attachment, and upon the further grounds that said Kintzings, or one of them, had an attachable interest in said property. The cause was tried *to* a jury, and the instructions of the court directed a verdict in favor of defendant Roberts, if they believed, from the evidence, said Kintzings or either of them, had an interest in the property in controversy. In accordance with said answer, instructions of the court, and evidence in the cause, the jury returned a general verdict for the defendant, and a judgment was thereupon entered for a return of the property to the said Roberts, no alternative verdict or judgment being rendered or entered.

73 The said Watson executed to said Roberts the undertaking sued on, and delivered the same to the coroner, which was duly approved, in accordance with the statute, and said property regularly bailed to said Watson.

On the 26th day of October, 1870, the plaintiff in the action of Lomme vs. Kintzing recovered judgment against both said Kintzings in the face of a plea of bankruptcy, interposed by Cha's S. Kintzing, the petition in which proceeding was filed before the institution of the action against him. No writ de returno habendo was ever issued or returned in the replevin suit, and no assignment of the undertaking sued on was ever made to the plaintiff in this action; but he brings his suit directly upon said undertaking, in his own name, without even joining said Roberts (whom he treats as a trustee of an express trust) in the action. The complaint in the replevin suit alleged the value of the property to be $2,500.00, which was not denied in the answer of said Roberts, but admitted by him. No special damages are alleged in the complaint in this action, and only the value of the property is claimed. The undertaking, as well as the complaint and answer, fixed the value of the property so turned over to said Watson at said sum of $2,500.00. On the trial of the cause the defendants offered to prove, by competent evidence, that said Kintzings had but a small attachable interest in

74 said property; that the same (if returned to said sheriff, treated as a trustee for plaintiff) would be of but little value; that no

demand was ever made for said property; that there was a difference in the value thereof at the time of the levy, and at the time the execution came into the hands of said Roberts, as sheriff, in the case of Lomme vs. Kintzings, (over a year having expired;) that no writ de returno habendo was ever issued, and offered instructions and evidence upon other propositions, which were all overruled by the court—a bill of exceptions regularly signed—all of which are presented by the record and assigned as error.

The following questions are presented for the consideration of the court by the record in the cause:

1st. Had the plaintiff in the action a right to sue upon the undertaking executed to Roberts in the replevin suit? Has he a legal interest in it, or but a beneficiary; or does such a relation exist between the said plaintiff and said Roberts, as by force of the law in the premises he can proceed upon the undertaking without an assignment of it?

See on these points:

(Practice Act '67, page 159, section 134, referring to.)
(" " " " 123 & 137.)
(" " , section' 109, 131, 217, 218, 216.)

See difference in character of proceedings under these sections.

Our practice act, title VII, chapter I, page 176, Laws 1867, charge the sheriff with the duty of making the judgment creditors demand
75 out of property attached by him, except in the single instance provided for by section 134. He has a corresponding duty and liability in the premises. The bail bond was substituted for the property, and his rights and duties are same at common law as by statute.

(See following authorities: 15th California, 304; 23rd Wendell, 489; 15th Texas, 187; 28th Texas, 206; 2 Hill, 329; 10th Texas, 153; 4 Conn., 417; 12th Johnson, 207; 12 Illinois, 93; Barbour on Parties, 22, 31, 34 & 36; 2nd New York, 388; 6th Nevada, 136; 5th Eng., 89; 11 U. S. Dig., 404; 12 Wend., 302; 27 U. S. Digest, sec. 84, page 98; 5 Hill, 293; 3rd Cal., 112; Morris on Replevin, 264; 24th Howard, 489; & see Prac. Act, section 134; 1st Eslee, page 56–17, & authorities there cited.)

The Ohio Code, section 44, provides for substitution of execution creditor. (See, also, same code, sections 42 & 43.) The sheriff or defendant in the replevin suit is the real party in interest, unless, by statute, the execution creditor is expressly made so.

2nd. The verdict and judgment in the replevin suit are not such as fix the liability of the sureties on the undertaking. The old action of replevin and trover are united in one under our practice, and they stand upon the same footing with respect to the alternative verdict and judgment. The New York, Californuia, and Nevada practice act, upon
76 this point, are precisely similar to our own.

(See Practice Act of 1867, section 177; 9th New York, 470; 9th New York, 559; 24th California, 147; 7 California, 568; 28th Barbour, P. R., 158 and 187; Thompson on Provisional Remedies, 165, 166, sec. 36; 23rd Barbour, P. R., 240; 1st N. Y. Digest, 592, sec. 31; 14th Cal., 555; 27th New York, 324 & 327; 2nd Nevada, 58; 18th Curtis, U. S. (H.) p. .)

3rd. The right barely to possession of Roberts, or any interest in the property of either of the Kintzings, was sufficient to entitle Roberts to recover. This is all that the verdict and judgment can cover. The court should have permitted defendants to show extent of and value of Kintzings' interest in the property.

(See Practice Act of 1867, title, claim & delivery; 1st Johnson, 280; 7th Johnson, 140; 10th New York, 580, 578; 17th Johnson, 116; 1st Wendell, 109; 10th Wendell, 322 and 344. Thompson on provisional remedies, page 165; Sedgwick on Measure of Damages, 582 and 583; 21st Wendell, 300.)

4th. Should not a writ of returno habendo have been issued and returned in the replevin suit?

(See Practice Act of 1867, section 210; Thompson on provisional remedies, 167, section 38; 10th Wendell, 334, and authorites there cited.)

77 Following analogy of practice act of 1867, section 134, it certainly should—cannot continue this action more favorable, for under this section the undertaking is given to pay any judgment, &c., and directly to execution or attaching creditors. If the court in the face of the rules of the common law makes a statute giving plaintiff a right to sue on the undertaking in this instance, as by section 134, should he not also be charged with having writ returno habendo issued, and a return elongata made, as provided by section 210?

5th. There should have been a demand made for the property, and the plaintiff in this action should have given an indemnity bond to the sheriff, and retained the property in order to have any right therein whatever.

(1st point, see 34th Missouri, 573; 2nd point, see 24th Howard R. R., 489; 8th California, 227.)

6th. The complaint and answer in the replevin suit, fixing the value of the property at $2,500.00, and the undertaking therein being for such sum, and no other damages being plead or claimed than the property or its value, is such value by the terms of the bond, complaint, and answer, and did the court not err in permitting evidence to the jury fixing such value at double such amount?

(See Drake on Attachment, 309, 310, 327, 342; 34th Missouri, 483; 2nd B. Monroe, 354. And every principle of estoppel applicable to trustee, cestui que trust, or agent and principal.)

78 7th. If the value was admissable, should it be fixed at the time the property was replevied, to wit, 12th of October, 1869, or at the date execution came to sheriff, to wit, 3d of November, 1870?

8th. So far as C. S. Kintzing was concerned, did not the suit abate after filing his plea and proofs in bankruptcy, and were not further proceedings void as to him and his bondsmen pro tanto?

(See Bankrupt Act, 1867.)

9th. Did the court not err in giving plaintiffs instructions, and refusing defendants? Was not the whole case tried upon the wrong theory? And if by any fair reasoning the plaintiff could recover at all in this (against which appellants earnestly protest,) should not the $2,500.00 fixed by the bond, answer and complaint in the replevin suit be credited by $1,300.00 realized by Lomme out of the goods sold by him on execution, being part of the goods so replevied?

J. H. SHOBER & E. W. TOOLE.
Of Counsel for Appellants.

Filed January 8th, 1872.

I. R. ALDEN,
Clerk Supreme Court, Montana Territory.

And afterwards, to wit, on the 10th day of January, A. D. 1872, the said respondent, by Messrs. Chumasero and Chadwick, his attorneys, filed herein his brief, points, and authorities, of which the following, in words and figures, is a copy, to wit:

79 *Argument on part of appellee by Chumasero & Chadwick.*

In the supreme court of Montana Territory.

JOSEPH A. LOMME, RESPONDENT,
vs.
JOHN M. SWEENEY ET AL., APPELLANTS.

It will be seen from the record in this case that it was an action brought in the third judicial district court, upon a statutory undertaking executed by the defendants to the sheriff of Lewis and Clarke County, in proceedings for claim and delivery of personal property, which had been levied on by the sheriff by virtue of a writ of attachment issued in a case wherein Lomme was plaintiff and Kintzing et al. were defendants; the property attached having been claimed by one W. S. Watson, the plaintiff in the suit in which the undertaking was given. Judgment was recovered by Lomme in the attachment suit wherein he was plaintiff, and in the action of claim and delivery by the sheriff against Watson, and on the verdict of the jury in the latter case for the return of the property to the sheriff. The first question presented by the appellants' brief in the case is as to the right of Lomme to bring suit in his own name upon the undertaking executed by the defendants to Roberts, the sheriff. Under the old system of practice, we have no hesitation in saying that the action could not be maintained by Lomme upon a replevin bond given to the sheriff, unless there had
80 been a formal assignment of the bond to the plaintiff. The reverse, however, we contend is the case under our code; and the action not only should but must be brought in the name of the party injured by the replevin suit, and who is entitled to the fruits of a recovery upon the undertaking executed in the case, no matter who is the nominal obligee. Let us, for a few moments, examine the sections of the Practice Act cited by appellants, viz, 134, 123, 137, 109, 131, 217, 218, 216, and see whether they sustain the view taken by appellants. We think that they clearly do not sustain such view, and such was the opinion of the former chief justice Warren and the present chief justice Wade, to whom the same question was presented and fully argued in this case in the district court, both of them expressing the unqualified opinion that this action was properly brought in the name of Lomme. In fact, we confess that we cannot see the applicability of the cited actions to this case, or how they can in any way elucidate the question. Each title and chapter of the Practice Act is complete in itself, and must be construed by itself, unless in conflict with other express provisions of the act controlling, limiting, or modifying some particular provision. Do either of the actions cited have such effect upon chapter 2, under which the proceedings were instituted, resulting in the giving of the undertaking and the proceedings thereon in this action? Sections 123, 134, 131, 137, are embraced in chapter 4, entitled attachment, and have
81 exclusive reference to the attachment law, and it seems to us that to argue that other portions of the Practice Act are to be treated as nullities simply because, in treating of a special matter, no reference is made to the general provisions of the act, is a reductio ad absurdum. Section 123 simply authorizes the sheriff to release the attached property, on defendant giving bond at the time of the levy. Section 137 authorizes such a release after the levy, and after the defendant has appeared in the action upon an order being made to that effect by the court or judge. This, however, was amended in 1869, page 67, by con-

ferring this power upon the sheriff. Section 134 gives to the attaching plaintiff, upon execution being returned unsatisfied, the right to prosecute any undertaking given, pursuant to sections 123 & 137, on the release of the property, or, at his option, to proceed as in other cases, and nothing more. No other power is conferred directly, it is true, but it is equally true that no other right is interfered or pretended even to be interfered with. No stretch by way of implication can be extended so far as to say that, because the legislature has said, "In such a particular case one may do thus," in all other cases his hands shall be tied, and general powers to perform acts be annihilated because one express power has been (as we contend unnecessarily) affirmatively granted.

Section 109 of the chapter on claims and delivery, section 131
82 of the attachment act, and section 218 on executions, are all on the question of claims interposed by 3rd persons to the property seized by the sheriff. Section 109 authorizes the sheriff to demand an indemnifying bond of the plaintiff upon such claim being made; and sections 131 and 218, authorizing the sheriff to summon a jury to try title to the property, a proceeding which has uniformly, whenever the question has been raised, been held to be illegal as conferring judicial powers upon the officer. Section 216 simply provides for the issuing of execution to the proper officer, and 217 describes what property shall be subject to the execution.

What comforting assurances the appellants had in citing these sections as authority to sustain their views, it is difficult to imagine, but that upon examination they will be found to be very widely inapplicable, we think, is a self-evident proposition. We contend, however, that the right to bring this suit in the name of Lomme is one that cannot be disputed, if any regard be paid to the statutes or decisions under precisely similar ones where the question has been raised. Our act, section 4, provides "that every action shall be prosecuted in the name of the real party in interest." Who is the real party in interest in this case, and for whose ultimate benefit is the bond taken? Certainly not for that of the sheriff. The object of the

undertaking in claim and delivery is to ensure the return of the
83 property to the defendant on the payment of its value in case of its non-return. Where property is levied on by a sheriff by virtue of an attachment, he does not thereby acquire any other interest in *in* the property than as trustee for the benefit of the plaintiff. He takes it, and holds it as trustee; and where it is replevied from his possession by a third party, the character of that interest is no way changed; but the plaintiff in the attachment still remains entitled to the proceeds or equivalent—the value of the property, if the property itself be not forthcoming in the event of his recovery in the attachment suit, and the defeat of the plaintiff in the action of claim and delivery. The sheriff then can, in no sense, be considered as the real party in interest. It is claimed, however, that the bond should have been assigned to the plaintiff in order to entitle him to sue. We deny the proposition under the section of the statute above referred to, and in analogous cases it has been so held. We cite Baker vs. Bartol, (7 California, 551.) In this case where the question was directly raised, the court uses the following language: "Formerly, where a bond was given to an officer, state or corporation, suit had to be brought in the name of the party holding the legal title for the benefit of the persons interested, but our statute has introduced a new rule, and by the provisions of the Practice Act, the suit must be prosecuted in the name of the real party in *in* interest. The declaration and bond show be-

84 yond all doubt that Baker, the present plaintiff, is the true party in interest, and there was no error in declaring in his own name." And again, Summers vs. Fanhh, 10 California, 351, the court says: "Whatever the rule may be under the old system, we think that under our system the right of action is in the party sustaining the injury; for on a recovery the other party, if entitled to receive the money at all, if judgment were had in the name of both, would hold it by right of and as trustee for the other, and our Practice Act has given the right to sue to the party beneficially entitled to the fruits of the action."

Where a promise is made by one party to another upon consideration to pay a debt to a third party, an action at common law could be maintained by such third party on the premise, although not an actual party to the agreement. (Bridge vs. Wingard Insurance Company, 1 Hall, 247; Arnold vs. Lyman, 17 Mass., 400; Jackson vs. Mayo, 11 Mass., 147. See also Wormouth vs. Hatch et al., 33 California, 121.) A careful examination of all of the numerous authorities cited by appellants discloses the fact that not one single one of them is applicable to the case, and do not even treat on the question upon which they are cited as authority. It is true that the case cited in 27 United States Digest, page 98, sec. 84, 27 Texas, is to the effect that a delivery bond may be sued by the party to whom it is given for the use of the plaintiff in the execution; but that cannot help the defendants in this case. It was

85 the old practice to bring actions where the legal title was in one in his name, for the use of the real party in interest. Such action now would be in violation of the provisions of the Practice Act. And the case in 3 Cal., page 112, cited by appellant, is one where a replevin bond was assigned, the court holding in that case that where the bond substantially conformed to the act an assignee might maintain an action on it. But we contend that even if an assignment were necessary to entitle the plaintiff in the attachment suit to bring this action in his own name, that such assignment was made. The complaint alleges the fact to be, "That, on the 12th day of October, 1870, the defendant made and delivered to the coroner, for the use of this plaintiff, pursuant to the provisions of said chapter, their written undertaking." And after reciting the fact that Roberts recovered judgment in the action for claim and delivery against the plaintiff Watson for a return of the property replevied, alleges "that the said undertaking was thereupon delivered to this plaintiff," Lomme.

This was a sufficient assignment under our act, at least, and on this point we cite the following numerous authorities, which could be added to indefinitely. No formality is necessary to effect the transfer of a chose in action. Any transaction between the parties which indicates their intention to pass the beneficial interest in the instrument from one to the other is sufficient for that purpose. A debt or claim may be assigned by parol as well as by writing. (2 Story's Eq., 311; Rob-

86 erts on Fr., 275; Hinkle vs. Warger, 17 How. U. S., 368; Judson vs. Corcoran, id., 612; Slaughter vs. Faust, 4 Blackf., 380; Briggs vs. Dorr, 19 Johns., 93; Green vs. Hart, 1 Johns., 580; Canfield vs. Munger, 12 id., 346; Prescott vs. Hull, 17 id., 244; 1 Estees, 58, sec. 23.) A judgment of a court of record, a bond or covenant, a mortgage of real estate, may all be assigned orally by mere delivery without any instrument in writing declaring the transfer. (Ford vs. Stewart, 19 Johns, 342; Briggs vs. Dorr, id., 95; Dawson vs. Cole, 16 id., 51; Runyon vs. Messercan, 11 id., 534.)

In New York, under their statute requiring a promissory note, payable to order, to be transferred by endorsement, it has been held under

the code to apply only to make the note negotiable, and that a transfer by delivery is all that is required to enable the holder to sue upon such bill or note in his own name.

(Savage vs. Bevier, 12 Howard, 166; Billings vs. Jame, 11 Barb., 620; White vs. Brown, 14 How., 282; Houghton vs. Dodge, 5 Bosw, 326; Senton vs. Fleet, 2 Hilton, 485; Brown vs. Richardson, 20 N. York, 472; 1 Bosw., 402; Farrington vs. Park Bank, 39 Barbour, 545; Gould vs. Ellry, id., 163.)

We think that on the first question, therefore, that, beyond all question, the right of Lomme to bring suit on the undertaking is established.

The second question is a new one in this Territory, but we believe can be satisfactorily solved as the one to which we have above directed our attention, and as upon the first, the appellants have cited numer-
87 ous cases, but one of them really in point, except 7 Cal., 568, and 24 Cal., 147. The cases referred to in their brief, 9 New York, 470, & id., 559, (being the same referred to in N. Y. Digest, 592, sec. 31,) 27 N. Y., 324 & 327, and 2 Nev., 58 & 6 id., are all cases in which a money judgment was rendered in favor of the defendant without the alternative to the defendant, allowing him to make return of the property in discharge of his liability to pay the value, thus depriving him and his sureties of the right given him by the statute. The object of the statute is to ensure the return of the property, and as an alternative, if default be made in that primary object, that the value thereof shall be paid. This is the object of the statute; and if the judgment had been as in the cases cited, simply for value, then the object of the statute would have been defeated, and the judgment would have been irregular, but not void, and on an appeal would have been corrected in the appellate court, as was done in the case of Fitzhugh vs. Wiman, (9 N. Y., 559.) In all of the above cases the appeal was directly from the judgment in the replevin suit. The case in 6 Nevada was of like character. We wish, in this connection, to specially call the attention of the court to the dissenting opinion of Rosekrans, in the case in 27 N. Y., 328, in which he says: "It is only necessary to add that this court, in the case of Ingersoll vs. Boswick, 22 N. Y., 425, and Johnson vs. Comley, 6 Seld., 570, held that the taking of judgment absolutely for the value of the property in an action of claim and delivery of personal property, instead of taking judgment upon the condition that de-
88 livery of the property cannot be had, is a mere irregularity, and not a ground of reversal of the judgment on appeal. It has also been decided in England and in this State that bail cannot, in an action against them, take advantage of any irregularity in the judgment or the execution issued upon it. (Campbell vs. Cuming, 2 Burr, 1187; Pet. on Bail, 366, and authorities cited; Gillespie vs. White, 16 Johns, 117.")

The case in 7 Cal., 569, was on an undertaking similar to the one under consideration, and is based on no authority; and, although the same has been re-affirmed in the supreme court of California, it has only been so done because it has been so long acquiesced in in that State that the courts there have regarded it as stare decisis.

The court saying in the case of Clasy vs. Rolland, 24 Cal., 149: "If we were called upon to construe the sections as an original question, unaffected by any prior decision upon the same point, we might be disposed to hold the complaint sufficient in this respect." And again, on page 153, "Although the reasoning of the court, in Nickerson vs. Chatterton, is not entirely satisfactory to our minds, yet the point was debatable, and we do not feel at liberty at this late day to disturb a decision concurred in by so many of our predecessors."

Evidently, while dissatisfied with the old ruling, only refraining from interference with it, because it had been decided, and from the length of time during which it had been acquiesced in, becoming so a
89 part of the law as that sureties in such cases might, "perhaps," be deemed to contract in view of that exposition of the extent of the liabilities they assumed. A lame and impotent conclusion, even in California—and certainly one that should not be followed in a Territory, where the question is raised for the first time, and where courts are untrammelled by decisions admitted to be erroneous, and which are only adhered to on account of their local antiquity in a State that gave them their monstrous birth. There has been but one case cited, and we believe that to be the only one, where the question has been squarely made and decided in accordance with all well-known principles of law and common sense, and that is the case cited by respondents, Whitney vs. Lehmer, 26 Ind. 503; in which case, being an action on a replevin bond executed under a statute precisely like our own, and taken from the New York Code, the father of all the codes, and in which case a judgment of retorno only was entered in the replevin suit; the court held the doctrine, as laid down by the California decisions above referred to, to be "*monstrous*," and that the action was maintainable on the bond, where there was judgment for a return only, notwithstanding the statute, which provided for the alternative judgment. We call the particular attention of the court to this case, and to the reasoning of the court, which we believe to be unanswerable. It certainly commends to the good judgment of every unbiassed mind; and when the paper is unstained by any former impurities of judicial decision, as in this Territory,
90 where the first decision has yet to be written, we trust that reason and common sense will guide the court in determining that nothing shall be placed upon the record which the court, as was the case in California, would in after years desire to see effaced. The third point made by appellants is, that the court should have permitted the defendants to show the extent and value of Kintzing's interest in the property. As on the previous questions, we have examined every authority cited by the appellants, and not a solitary one of them touches the question, or in the very slightest particular has any reference, however remote, to it. It would seem as if the object of the attorneys of the appellants was to endeavour to impose upon the court by citing an array of cases, trusting that they would not be examined. On no other hypothesis can we account for it. There is, however, nothing in the first. The goods, as shown by the pleadings and evidence, were attached as the property of B. C. & C. S. Kintzing, who were partners. Subsequently C. S. Kintzing filed an answer, setting up that he was, some months after the levy, adjudged a bankrupt, which was the only defense interposed, and judgment was rendered against B. C. personally, and against the partnership property attached of B. C. and C. S. Kintzing. The levy was not destroyed by the act of bankruptcy of one partner. The partnership property was liable, in the first instance, to pay partnership debts before being subjected, either by the partners themselves, or by operation of law, to the payment of individual debts of a
91 member of the firm. The judgment has never been reversed, or in any way interfered with, but was affirmed by the supreme court of this Territory. The record shows also, conclusively, that in the case of Watson vs. Roberts, in which the undertaking sued on was given, that Watson claimed to be the general owner of the goods by purchase from the Kintzings, who were the original owners. The defence being, that the sale to Watson was fraudulent, and the question of title

was raised and determined in that suit, and that finding and determination is conclusive. The defendants could not open up that question, and again present the same issues which had once been finally determined. For numerous authorities on this question, we refer to our brief filed in the case, and again cite a portion of them here to the following effect:

In suit on replevin bond where the plaintiff has become non-suit, defendants cannot show property in plaintiff. (Smallwood vs. Norton, 2 app. 83, cited in 5 United States Digest, page 703, sec. 246.)

In suit on replevin bond, bondsmen will not be allowed to introduce evidence that plaintiff was but part owner. (Williams vs. Vail, 9 Mich., 162.) When judgment in replevin passes on the question of title, the finding is conclusive in an action on the bond. (12 Iowa, 4 Withrow, 42.)

A plaintiff in a replevin suit, in which judgment was that the property should be returned to the defendant, cannot avoid a recovery against him by showing that the property belonged to a stranger. (Smith vs. Lisher, 22nd Indiana, 500.)

92 In an action on a forfeited replevin bond, the obligor is estopped from showing title to the property in another than the defendant in the attachment. (Mitchell vs. Ingram, 38 Alabama, 395.)

In an action on a replevin bond, a plea that the property belonged to the plaintiff is bad. (Sherey vs. Foresman, 6 Blackf., 56; Davis vs. Crow, 7 Blackf., 129; 3 Mass., 302.)

A surety in a forthcoming bond, (the condition of which is precisely like the undertaking in this case,) cannot plead that the property levied on by the attachment was not the property of the defendant, and thereby discharge himself. (Gray vs. McLean, 17 Illinois, 404.)

The condition of a replevin bond, that the plaintiff will prosecute the action to effect, is a substantive and independent condition, and as material as any other. (38 Illinois, 228.)

And it is no answer in an action on the bond that the principal has become bankrupt and obtained a certificate of discharge, and that the property in the chattels having by force of the commission of bankruptcy vested in commissioners, it had become by act of the law impossible to fulfill the condition of the bond. (Flagg vs. Tyler, 6 Mass., 32.)

In regard to the 4th & 5th questions presented by appellants as to the necessity of writ of returno, return of elongata, and demand, we will consider them together. The only case cited in the case of Cowden vs. Pease, (10 Wend., 334,) where it is said by the court: "It is true

93 that the suit on the bond cannot be commenced until the return of the execution unsatisfied, in whole or in part, sec. 64, but this is a matter of proof."

Now let us see why the court so said. We have the Revised Statutes of New York, and find sec. 64, referred to by the judge delivering the opinion of the court, to read as follows: "Sec. 64. If any writ of returno, or other execution issued in favor of the defendant in the action, shall be returned unsatisfied, in whole or in part, such defendant, or his representatives, may have an execution upon the bond executed by the plaintiff and his sureties to recover the value of the property replevied, and the moneys, damages and costs, awarded to such defendant, as the case may be, and such bond shall be assigned to such defendant, or his representatives, on their request." (Revised Statutes New York, title, Replevin, p. 439.)

The New York decision is based upon a statute, and we have no such statute. All the other decisions on this question, when there is no statute on the subject, hold that such writ and demand is unnecessary.

We cite the cases of Perrean vs. Bevan, (8 D. & R., 72; 5 Barnewell & Cresswell, 284,) where the court say: "The condition of a replevin bond for prosecuting the suit 'with effect,' means prosecuting it 'with success;" and, therefore, if a plaintiff in replevin fails, the condition is broken, and the defendant is not restrained from sueing on the bond, though he omits to sue out a writ de returno habendo, and cause
94 elongata to be returned thereon. (See also Saunders' Pleading & Evidence, 770.)

The same question was presented in Nickerson vs. Chatterton, (7 Cal., 573.) The court say in that case: "We think the plaintiff was not bound to delay suit upon the undertaking until after the issue and return of the execution." In Slack vs. Heath, (1 Abbott, 331,) Merarge vs. Mudge, (6 Abbott, 243,) Livingston vs. Hammer, (7 Bosne., 671,) it was held, "in an action against sureties in an undertaking given for the return of specific personal property, it is not necessary to allege the issuing of an execution against the original defendant." But this was done in this case. In Ormsbee vs. Davis, (16 Conn., 578,) the court say that it has never been the practice in Connecticut that a writ of returno was necessary to be issued and returned in the replevin suit in order to subject the sureties to an action.

In Persse v. Watrous, (30 Conn., 140,) the court held that no demand upon the replevin bond, either for the penalty of the bond or for the amount of the judgment obtained in the attachment suit, was necessary before bringing the suit on the bond.

In Peck v. Willson, (22 Ills., 206,) in delivering the opinion of the court, Justice Breese says: "We are not of opinion that a writ of returno habendo shall actually issue, and elongata returned, before an action can be brought on the replevin bond. It is sufficient that the judgment awarded the return, and to prove that no return was made." (See also 2 Scam., 544.) As to the 6th and only remaining question as to
95 the amount of damage to which the plaintiff was entitled, we deny that the complaint and answer in the replevin suit have or should have any controlling influence or furnish the true criterion. The value of the property is to be assessed from the evidence alone. The fact that a plaintiff in replevin, for the purpose of determining the penalty of the bond required to be given, makes his ex-parte affidavit of value, certainly cannot conclude the defendant whose property is seized and taken from his possession, and prevent him, when it becomes necessary, from showing the full extent of the injury sustained by him by proof of actual value. Nor does it at all change the rights of the defendant in this regard, because the law authorizes him to retain possession by giving a bond. If the contrary should be held, it would result in very many, and perhaps in a majority of instances in outrageous oppression, for it may not always be in the power of the defendant, within the time limited by statute, to procure the necessary sureties in such case. The damages which we contend may be recovered by the defendant in replevin, and to which he is entitled, are the actual damages sustained, to be established by proof; where he is adjudged to be the general owner, the full value of the property at any time between the taking and the judgment of returno; and if he be simply an attaching creditor, to the full extent of his lien, provided the same does not exceed the value of the goods—not the decreased value (if any)
96 intermediate the day of seizure and judgment of returno, but the highest value between those times. Any other rule would be permitting the plaintiff in replevin to take advantage of his own wrong.

There is no error in any ruling of the district court, nor in the giving or refusing instructions.

We therefore confidently ask that the judgment of the district court be affirmed.

Jan'y 30, 1872.

CHUMASERO & CHADWICK,
Attorneys for Respondent.

Filed, Jan'y 10, '72.

I. R. ALDEN, *Clerk.*

And on the same day it was stipulated and agreed by and between counsel for the respective parties in this action, and sanctioned by the court, that the said cause should be submitted upon written arguments, which was done accordingly. And thereupon the court took the said cause under advisement until the next term of this court.

And afterwards, to wit, at the August term, A. D. 1872, of said supreme court, the following proceedings herein were had:

Supreme court of Montana Territory, August term thereof, A. D. 1872.

97 JOSEPH A. LOMME, PLAINTIFF AND RESPONDENT,
against
JOHN M. SWEENEY AND ANTON M. HOLTER, defendants & appellants.

On this day, to wit, the 19th day of August, A. D. 1872, that being one of the days of the said August term of said court, the above-entitled cause, submitted at the January term, A. D. 1872, of said court, coming on for judgment on the appeal herein:

It is ordered, considered, and adjudged here by the court, that the judgment entered herein by order of the court below be affirmed with costs.

And thereupon the court filed herein their opinion in writing, of which, in words and figures, the following is a copy, to wit:

Opinion of the court, delivered by Knowles, justice.

JOSEPH A. LOMME
vs.
JOHN M. SWEENEY AND ANTON M. HOLTER.

This cause comes to this court on appeal from the 3rd judicial district. The record presents the following facts: Lomme commenced an action to recover a debt against B. C. & C. S. Kintzing for the sum of four thousand three hundred and eighty-four $\frac{89}{100}$ dollars, and interest
98 thereon. As auxiliary to this action, for the purpose of securing any judgment he might obtain therein, he procured the issuance of a writ of attachment, which the sheriff, W. K. Roberts, levied upon certain property as belonging to the Kintzings. Afterwards W. S. Watson brought an action of replevin against Roberts, and came into possession of this property. In this action John M. Sweeney and Anton M. Holter entered into an undertaking, in the sum of five thousand dollars, to Roberts, conditioned that the said Watson should return the said property to him if a return should be adjudged, and that he would pay

any sum of money as might for any cause in said action be recovered against him. In the case of Lomme against the Kintzings, Lomme recovered a judgment for the sum of $4,954.93, and five hundred and fifty-two $\frac{50}{100}$ dollars costs. In the action of Watson against Roberts, Roberts recovered judgment against Watson. The verdict of the jury in that case was as follows: "We, the jury in the above-entitled cause, find for defendant." Upon this verdict the court adjudged that the defendant Roberts was entitled to a return of the property. No demand was made of Watson for a return of said property on behalf of Roberts, nor was there any writ issued by the court for the purpose of taking possession thereof and returning it to Roberts. There was no assignment of the undertaking executed by Sweeney and Holter to Lomme. The same was delivered to him, however, by Roberts, and he brings this ac-
99 tion in his individual name. It may be proper to remark that the bill of exceptions in this case is presented to the court in an imperfect condition, and not as prescribed by law. The record does not clearly point out the alleged errors of which the appellant complains. As the respondents, however, make no objection to the record, we will consider the imperfections as waived.

The first question we are called upon to determine is, as to whether or not Lomme had any right to bring this action in his own name; whether or not he is the proper party plaintiff therein. The undertaking was made payable to Roberts. In what capacity did he hold the goods taken from him by Watson? He held them as an officer for the purpose of preserving the lien which had been created therein in favor of Lomme by virtue of the writ of attachment in his suit against the Kintzings, and also that they might be made subject to the satisfaction of any execution Lomme might procure to be issued against those parties in this action against them. He likewise held them for the purpose of returning them to the Kintzings should Lomme fail to recover judgment against them. It will be observed from this that Roberts had but a special property in these goods. He held them for the benefit of others. His position was analogous to that of receiver. "A trustee is a person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another." (Hill on Trustees, page 65.)

100 Lomme had, perhaps, no estate in these goods, but Roberts was exercising a power over them for his benefit, and hence was his trustee. A trustee can maintain an action for any damage to property he may hold in trust, and the amount of damages he may recover will be commensurate with the damages done to his cestui que trust, and to his individual interest. At law the trustee is considered as holding all the title or interest of his cestui que trust. A stranger would not be allowed to set up an outstanding equity of a cestui que trust for the purpose of lessening a trustee's damages to the property he holds. The undertaking was then given to secure all damages which Roberts might sustain by a failure to return the goods to him, should the court so adjudge, whether those damages should accrue to him in his individual or representative capacity. Lomme had a right to have these goods in Roberts' hands, in order that they might be taken under execution to be sold to satisfy any judgment he might obtain against the Kintzings. The fact, however, that they were taken on legal process from the possession of Roberts would be a sufficient legal excuse for not being able to produce the goods. The only thing Roberts might have been liable for would have been negligence in exacting proper security from Watson, for a sheriff is only liable for negligence in such cases. Lomme

was really the person, then, who was damaged by a failure of Watson to return the goods, and the undertaking was given to secure him in his rights concerning the goods. Roberts occupied the position of a
101 trustee of an express trust in receiving the undertaking from appellants. A trustee of an express trust is defined to be, in our statute, a person with whom or in whose name a contract is made for the benefit of another. (See Laws of 1867, page 136, section 6.) The utmost extent of signification is to be attributed to this term, "trustee of an express trust." (Whittaker's Practice, vol. 1, page 63.)

The case of a trustee of an express trust is an exception to the rule that every action must be prosecuted in the name of the real party in interest.

"The fact, however, that the trustee of an express trust might bring an action in his own name does not in most instances preclude the beneficiary or real party in interest from likewise bringing suit in his name and the instance of a party for whose benefit a contract was made, is a case in which this may be done." (See Whittaker's Practice, volume 1, page 64; the Camden Bank vs. Rogers, 4 Howard, 63; Lane vs. The Columbus Insurance Company, 2d C. R., 65; Baker v. Bartol, 7 Cal., 557; Tauffe vs. Rosenthal, 7 Cal., 514.)

For these reasons we consider Lomme a proper party plaintiff. The second question presented is the liability of the defendants under the judgment entered in favor of Roberts and against Watson. It is claimed that because Roberts obtained against Watson no alternative judgment for the value of the property in case a return could not be had, that these defendants are not liable on their undertaking.
102 That they made themselves liable on their undertaking only to make good such judgment as Roberts might lawfully obtain against Watson, and that the only legal judgment Roberts could obtain against Watson was for a return of the property, or its value, in case a return could not be had. Now we hold that a judgment for a return of the property was not a void judgment, but, at the worst, an irregular one. An irregular judgment is not an illegal or unlawful one.

(Johnson vs. Comley, 10 New York Reports, 570.
Ingersoll vs Bostwick, 22 " " " 425.)

An irregular judgment will support an execution and may be enforced. (Rawley vs. Howard, 23 California, 401.)

It is not true, however, that the law in regard to the judgment to which a party may recover in an action of replevin enters into and forms a part of the contract which sureties enter into in an undertaking in such an action so as to vary the same. Sureties in such an undertaking are bound by the contract they sign. Their liability cannot be extended or made less by any such statute. The conditions of such an undertaking are prescribed by law. It is not claimed that the undertaking sued upon is not in all particulars in conformity to the statute. This is what the defendants undertook for Watson. "For the prosecution of such action for the return of the said property, if return thereof be adjudged, and for the payment to the said defendant of such
103 sums as may from any cause be recovered against the said plaintiff." This is not an alternative undertaking. The defendants did not contract in this undertaking that Watson should return the property if the same should be adjudged, or they would pay the value thereof. They contracted both that Watson should return the property if it should be so adjudged, and pay any judgment the defendant in the action might recover for any cause for money against him. If the

plaintiff in that action failed to perform any one of the things the sureties had undertaken that he should, the sureties became liable on their undertaking to the extent of the damages suffered for such cause. A judgment for a return of the property was awarded, and the property not returned. The cases of Nickerson vs. Chatterton, (7 Cal. 568,) and Clary vs. Rolland, (24 Cal., 147,) cited by the appellants, maintain a different opinion from that here expressed. The latter case, however, while following the former upon the doctrine of stare decicis, holds the following language:

"If we were called upon to construe the sections as an original question unaffected by any prior decision upon the same point, we might be disposed to hold the complaint sufficient in this respect. Such was our impression upon the argument, but, upon a careful examination of the decisions of the supreme court referred to in the argument, we find that the point has been determined the other way."

104 The point in that case was raised by demurrer alleging that the complaint did not state facts sufficient to constitute a cause of action, for the reason that the complaint did not show a judgment in the alternative either for a return of the property or its value. This language has the effect to destroy certainly the authority of the case of Nickerson vs. Chatterton to a considerable extent. That court, after a mature consideration, evidently does not approve of the principle laid down in that case, and are forced to approve of it for different reasons. In direct opposition to the case of Nickerson vs. Chatterton is that of Whitney et al. vs. Lehmer et al., 26 Indiana 504. The principle upon which this case is decided is evidently that the practice in an action of replevin, as to the verdict and judgment that may be entered therein, does not affect the liability of the sureties in an undertaking in that action. That their liability is fixed by their undertaking, and for a breach of it, those entering into the same were liable. The case of Gallarati vs. Orser, (27 New York Reports, 324,) it is claimed, announces a rule in accordance with that of Nickerson vs. Chatterton, and adverse to that expressed by this court. The judgment considered in that case was for the value of the property only, and for that reason it was held that the sureties liable on an undertaking in arrest were not held. We are not prepared to say that this ruling was not correct. The sheriff,

105 from having discharged a defendant from arrest without sufficient bail, was held to be liable, as sureties, had they been given, would have been. One of the provisions of an undertaking in such a case is the same as required in an undertaking in replevin. The sureties were required by the law to undertake that the defendant would produce the property and pay the plaintiff such sum as might for any cause be adjudged against him. Under such a clause as the last, it was claimed that the sureties would be held liable when the judgment was for the value of the property only. The court, however, held otherwise. There is reason for holding that the provisions of the statute in relation to the judgment for money that should be entered in replevin may be considered as explaining this clause of an undertaking, and that sureties undertake only to pay such judgment as should be properly adjudged, and that a proper judgment was an alternative one for the value in case a return cannot be had. In such a case it might be claimed that the judgment not being in the alternative did vary the contract of the sureties. This view of this question, however, is not free from doubt. In that case one of the judges dissented from the opinion of the court, and held that the judgment was only an irregular one, and that the sureties were held on an irregular judgment, the same

as their principal. And in direct conflict with that opinion is
106 the case of Mason vs. Richards et al., (12, Iowa, 73.) The court in that case held that the judgment for the value of the property only was irregular and erronrous, but not void; that such a judgment could be enforced against the principal, and that the sureties were not released, but liable. The defendants in this action, however, insist that our statutes upon the subject of the recovery of personal property were borrowed from California, and that we are bound by the construction put upon them by the courts of that State. The statutes in question substantially existed in a great many States of this Union besides California at the time our legislative assembly adopted it. California adopted it from New York.

The correct appellation for our practice is the New York Code practice, and not the California Code practice; and as the New York courts had not fully determined this precise point when our legislative assembly adopted its code, we should consider ourselves free to determine this question upon principle, and not upon authority. The defense of the bankruptcy of C. S. Kintzing, set up by defendants in this action, we think wholly untenable. That defence was set up by Kintzing in the action of Lomme vs. B. C. and C. S. Kintzing. The plaintiff alleges in his complaint in this action that he recovered judgment against the Kintzings for $4,954.93 in that action, and this averment is not
107 denied by the answer of defendants. If that judgment was erroneous, it cannot be attacked in this action. It is not a void judgment, and hence cannot be reviewed in a collateral action. In relation to the right to the possession of the property, that was considered and decided in the action between Watson and Roberts. If C. S. Kintzing had become a bankrupt, his assignee in bankruptcy might be entitled to the possession of the property, but that is no reason why Watson should be entitled to take the property from Roberts and hold the same. He claimed the right to the possession through the Kintzings himself, and not under C. S. Kintzing, assignee. We hold that the sureties on the replevin undertaking had no right to introduce evidence in this action, of the interest of the Kintzings in the property replevied. The answer denies that the Kintzings had any interest in property that was the subject of the attachment, but there is no regular allegation of ownership in any one else. There is no plea of this kind set up by way of defense, such as would be required in order to entitle the defendant to prove the same. Again, where the question of who is the actual owner of property is in dispute, we do not think that the defendants in an action on an undertaking in replevin can set up title in a stranger, and in that action compel the plaintiff to litigate his title to the property upon which there had been a determination between the plaintiff
108 and the principal for whom the sureties became liable. As appears from the record in the action of replevin, Watson claimed to be the owner of the property in dispute, and alleged that he derived title by purchase from the Kintzings. It does not appear in this case from the exception taken who the defendants claimed was the owner of the property. If it was the assignee of C. S. Kintzing in bankruptcy, then they could very properly have held that partnership property must first go to the liquidation of partnership debts; and that, until these were liquidated, the property could not pass to his assignee. It was not necessary for the plaintiff to have a writ reterno habendo issued and returned unsatisfied before he could bring this action. The sureties undertook that Watson should return the property if a return thereof should be adjudged. A return was adjudged and Watson failed to re-

turn the property. This was a breach of the undertaking. The case of Nickerson vs. Chatterton decides that no writ returno habendo was necessary in order to fix liability of the sureties; and that case may be considered as very favorable to sureties. It is claimed by appellants that if plaintiff is entitled to recover, he is only entitled to recover damages to the amount of the value of the property as specified in the complaint of Watson in his action of replevin. In a complaint
109 in an action of replevin the plaintiff states the facts which entitle him to a judgment. If he wishes a judgment for the value of the property, in case the possession of the same is not delivered to him, he must allege its value. This is the basis of his right to recover such a judgment; but to hold that because the defendant in the action of replevin does not in his answer not only confess the value of the property which the plaintiff has fixed upon it, but allege that it is of much greater value, that he is bound by this allegation of the plaintiff, and cannot prove the actual value of the property taken in an action on the undertaking, would be imposing upon him great hardship surely. It is doubtful if the defendant in an action of replevin could base his right to a judgment for the value of the property without alleging the value of the same in the answer. The answer of a defendant in an action of replevin, claiming a return of the property, or, in case that cannot be had, a judgment in the alternative of its value is in the nature of a cross complaint, and must state facts sufficient to warrant the court in giving the relief demanded. (See 8 Cal.) In no case can the allegations of the complaint be a basis to warrant the affirmative relief prayed for by the defendant. Of course, where the allegations of the complaint have been denied by the answer, and the plaintiff fails to make out his case,
110 the judgment of the court would be for a return of the property. There are cases to the effect that, where the court awards a judgment of non-suit, the defendant is not entitled to an alternative judgment for the value of the property. If the rule, however, contended for was the correct one, why the value of the property alleged in the complaint would not be a basis for an alternative judgment. We are unable to perceive where a non-suit was adjudged. It was not necessary that the plaintiff should have made any demand for a return of the property. The only object of making a demand is to notify the party in possession of the property of the rights and claim of the person entitled to the property. Of this the principal and his sureties had ample notice in the action of replevin. The plaintiff in that action set up his rights and claimed a return of the property, and judgment of return was awarded him, and that certainly was sufficient notice. For these reasons the judgment of the court below is affirmed.

DECIUS S. WADE, *Chief Justice.*
HIRAM KNOWLES, *Associate Justice.*

Filed August 19th, 1872.

I. K. ALDEN, *Clerk.*

111 An' thereupon the said appellants moved the court for a writ of error and appeal from the foregoing decision to the Supreme Court of the United States, which said writ was duly granted by the court, and the bond on appeal fixed at $8,000.00.

And on the same day, to wit, the 19th day of August, A. D. 1872, the said defendants and appellants filed herein their undertaking on appeal to the Supreme Court of the United States, of which, in words and figures, the following is a copy, to wit:

Undertaking on appeal.

In the supreme court, Montana Territory.

JOSEPH A. LOMME, RESPONDENT, *vs.* JOHN M. SWEENEY AND ANTON M. HOLTER, APPELLANTS.	Undertaking on appeal to Supreme Court of the United States.

Know all men by these presents that we, John M. Sweeney, Anton M. Holter, Owen Williams, and Martin M. Holter, of Lewis & Clarke County, Montana Territory, are held and firmly bound unto Joseph A. Lomme, of Montana Territory, in the sum of eight thousand dollars, (being the amount fixed by the court,) to be paid to the said Joseph A. Lomme, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated
112 this 17th day of August, A. D. 1872.

Whereas the above-named John M. Sweeney and Anton M. Holter have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the Territory of Montana: Now, therefore, the condition of this obligation is such, that if the above-named John M. Sweeney and Anton M. Holter shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JOHN M. SWEENEY. [SEAL.]
ANTON M. HOLTER. [SEAL.]
OWEN WILLIAMS. [SEAL.]
MARTIN M. HOLTER. [SEAL.]

Sealed and delivered in presence of—
THOMAS J. LOWERY.

Filed August 19th, 1872.

I. R. ALDEN, *Clerk.*

Bond approved and supersedeas granted this 19th day of August, A. D. 1872.

D. S. WADE, *Chief Justice, Montana Territory.*
HIRAM KNOWLES, *Associate Justice* " "
JOHN L. MURPHY, " " " "

And on the same day, to wit, the 19th day of August, A. D. 1872, the said appellants, by their attorney, John H. Shober, esqr., filed herein their writ of error, of which the following is the original; the same being hereunto attached and made part of this record, to wit:

113 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme court of the Territory of Montana:

Because, in the records and proceedings, and also in the rendition of the judgment of a plea which is in said supreme court before you, be-

tween Joseph A. Lomme and John M. Sweeney and Anton M. Holter, a manifest error hath happened to the great damage of the said John M. Sweeney and Anton M. Holter, as by his complaint appears: We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that, if judgment be therein given, that, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same
at Washington on the first Monday of December next, in the said
114 Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this 4th day of December, in the year of our Lord one thousand eight hundred and seventy-one.

SEAL.] I. R. ALDEN,
Clerk of the Supreme Court of the Territory of Montana.

Allowed Aug. , A. D. 1872.

Chief Justice Supreme Court, Montana Territory.

115 MONTANA TERRITORY, *County:*

, being duly sworn, says that, on the day of August, A. D. 1872, he served the within writ of error on , the attorneys of Joseph A. Lomme, by showing the same to them and delivering a copy to them personally.

Subscribed and sworn to before me this day of August, A. D. 1872.

(Indorsed:) Joseph A. Lomme vs. John M. Sweeney & Anton M. Holter. Writ of error. Filed Aug. 19, 1872. I. R. Alden, clerk.

116 And afterwards, to wit, on the 25th day of August, A. D. 1872, the said appellants filed herein their citation, duly served, th' original of which is hereunto attached and made part of this record, and recites as follows, to wit:

117 UNITED STATES OF AMERICA, *ss:*

To JOSEPH A. LOMME, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, being the 2d day of December, A. D. 1872, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Montana, wherein John M. Sweeney and Anton M. Holter are plaintiffs and you are defendant in error, to show cause, if there be, why the judgment in said writ of error should not be corrected and speedy justice should not be done to the parties.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 19th day of August, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] DECIUS S. WADE,
Chief Justice of the Supreme Court of Montana Territory.

118 MONTANA TERRITORY,
Lewis & Clarke County:

John H. Shober, being duly sworn, says that, on the 22 day of August, A. D. 1872, he served the within citation on Messrs. Chumesero & Chadwick, attorneys of Joseph A. Lomme, (within-named defendant in error,) by showing the same to them, and delivering a copy to them personally.

JOHN H. SHOBER.

Subscribed & sworn to before me this 22 day of August, A. D. 1872.

E. W. CARPENTER,
U. S. Com'r, 3d Dist. Court, M. T.

119 Copy of the within citation received this 22d day of August, A. D. 1872.

CHUMESERO & CHADWICK,
SANDERS & LYNN,
Pl'ff's Att'ys.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

I, H. P. Wade, clerk of the district court, third judicial district, in and for the county and Territory aforesaid, do hereby certify that E. W. Carpenter, who acknowledged the foregoing affidavit, is, and was at the date of taking the same, United States court commissioner for said district, and that his signature thereto is genuine.

Witness my hand and the seal of said court this 22d day of August, A. D. 1872.

[SEAL.]

H. P. WADE, *Clerk.*
ALEX. H. BEATTIE,
Deputy Clerk.

(Indorsed:) Joseph A. Lomme, respondent, vs. John M. Sweeney & Anton M. Holter, appellants. Citation. Filed Aug. 25, 1872. I. R. Alden, clerk.

120 Supreme court of Montana Territory.

JOSEPH A. LOMME
vs.
JOHN M. SWEENEY AND ANTON M. HOLTER.

I, Isaac R. Alden, clerk of the supreme court of Montana Territory, do hereby certify the foregoing to be a full, true, and correct copy of the proceedings had and done in the 3rd judicial district and supreme courts of said Territory in the above-entitled action, as the same appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court at Virginia City, in said Territory, this 8th day of October, A. D. 1872.

[SEAL.]

ISAAC R. ALDEN, *Clerk.*

(Indorsement on cover:) No. 312. John M. Sweeney & Anton M. Holter, plaintiffs in error, vs. Joseph A. Lomme. Montana Terr'y sup. c't. Filed 3rd December, 1872.

Supreme Court of the United States.

OCTOBER TERM, 1874.

JOHN M. SWEENEY and ANTON M. HOLTER, Plaintiffs in Error,

vs.

JOSEPH A. LOMME, Defendant in Error.

No. 40.

IN ERROR TO THE SUPREME COURT OF MONTANA.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to a judgment of the Supreme Court of Montana, affirming with costs a judgment of the district court for the third judicial district of that Territory, entered against plaintiffs in error, and in favor of defendant in error, on the 10th of November, 1871, for five thousand dollars. (Rec., p. 45, also p. 33.)

The case arose in the district court thus:

Joseph A. Lomme, defendant in error, brought suit against B. C. and C. S. Kintzing, as partners, to recover a debt, and issued in that suit a writ of attachment, under which W. K. Roberts, as sheriff, seized certain personal property, alleged to belong to the Kintzings, as security for the satisfaction of any judgment that might be recovered against them.

Thereupon one W. S. Watson instituted an action (in the nature of an action of replevin) against Roberts, the sheriff,

to recover possession of this property, and the property was delivered by the coroner of the county to the plaintiff, Watson.

In this action of replevin the present plaintiffs in error, Sweeney and Holter, on October 11, 1869, entered, as *sureties*, into a written undertaking to Roberts, in the sum of five thousand dollars, (being double the value of the property replevied,) conditioned (as prescribed by the Civil Practice Act) for the return of the property to Roberts, if return thereof should be adjudged, and for the payment to him of such sum as might be recovered against Watson. (Rec., pp. 9, 10, fol. 18, 19.)

In this action of *Watson* against *Roberts* the jury found simply a verdict "*for defendant*," on which the court, on April 6, 1870, entered a judgment, to the effect that "*defendant, Roberts, recover from plaintiff, Watson, the possession of said property replevied in this action*," and his costs. (Rec., p. 8.)

The jury in that action failed to find the *value* of the property replevied, nor was any alternative judgment entered against Watson, as required by the Civil Practice Act, for the *value* of the property, in case a return could not be had.

In the first suit above mentioned of *Lomme* against *B. C. and C. S. Kintzing*, Lomme obtained, on October 27, 1870, a judgment against the Kintzings for $4,954 93 with interest at 10 per cent. and costs, (Rec. pp. 11, 12,) a portion of which only was collected by execution.

Thereupon Lomme, plaintiff in that judgment, brought suit against Sweeney and Holter, the present plaintiffs in error, as sureties in the undertaking given to Roberts in the replevin suit instituted against him by Watson for the property attached by Roberts, at the instance of Lomme, as the property of B. C. and C. S. Kintzing.

The object of this suit was to recover from the sureties

in that undertaking the value of the property replevied, or so much thereof as might be necessary to satisfy the balance of the amount due upon the judgment obtained by Lomme against the Kintzings. (Rec. p. 3, vol. 5.)

In this suit on the replevin undertaking, Lomme recovered in the district court a judgment against the sureties, the present plaintiffs in error, for the full amount of the balance due upon the judgment obtained by him in the suit against the Kintzings.

The plaintiff in error appealed from that judgment to the Supreme Court of the Territory, (Rec., p. 33,) by whom it was affirmed. (Rec., p. 45.)

It is now before this court for review.

In the district court, the plaintiff, Lomme, gave no evidence of the assignment, or of the *delivery*, of the replevin bond to him by the defendant in the action of *Watson* v. *Roberts*.

He was allowed, nevertheless, to recover upon that undertaking against these sureties, in a suit instituted in his own name.

No execution was ever issued upon the judgment for the possession of the property replevied, entered in favor of defendant in *Watson* v. *Roberts;* nor was any evidence offered by Lomme of any demand by Roberts, or by him, Lomme, on behalf of Roberts, upon Watson, or the sureties, for a return of the property replevied.

We have stated that the *value* of the property replevied in *Watson* v. *Roberts* was not found by the jury on the trial of that action, and that the alternative judgment provided by the statute of the Territory in such action was never entered in the case.

But notwithstanding this, the plaintiff in this action on the replevin bond was permitted by the district court to prove the value of the property attached, at the time it was replevied by Watson, and to recover from the sureties the full value of this property, or so much thereof as was neces-

sary to satisfy the judgment against the defendants in the original attachment.

All this, we shall submit, was plain error, for which the judgment below must be reversed.

Assignment of Errors.

The district court, on the trial of the action of *Lomme* v. *Sweeney and Holter*, erred as follows:

1. In allowing the plaintiff to give in evidence the pleadings, the verdict and judgment, the undertaking and execution for costs, in the case of *Watson* v. *Roberts*, and the execution, levy, and return of execution, in the case of *Lomme* v. *B. C. & C. S. Kintzing*. (1st exception, Rec., p. 16.)

2. In allowing plaintiff to introduce evidence of and to prove the value of the property replevied in *Watson* v. *Roberts*, at the time the same was replevied. (2d, 3, and 4th exceptions, Rec., p. 16.)

3. In overruling the defendants' motion for a non-suit. (5th exception, Rec., pp. 16, 20.)

4. In overruling defendants' motion to strike out the evidence given by plaintiff touching the value of the property replevied. (6th exception, Rec., p. 20.)

5. In rejecting the evidence offered by the defendants to show the value of the property replevied, at the time the execution in the case of *Lomme* v. *B. C. & C. S. Kintzing*, was issued or reached the sheriff's hands. (7th exception, Rec., p. 21.)

6. In rejecting the evidence offered by the defendants to prove that C. S. Kintzing was the only party who had an attachable interest in the property replevied, and the extent of his interest. (11th exception, Rec., p. 28, fol. 57.)

7. In overruling the evidence offered by defendants to prove that B. C. & C. S. Kintzing had but a small attachable interest of little value in the property attached by Lomme and replevied by Watson. (12th exception, Rec., p. 29, fol. 58.)

8. In giving to the jury the first instruction asked for by the plaintiff, that the plaintiffs' damages should be assessed at such amount as the jury might find remained unsatisfied upon his judgment against B. C. & C. S. Kintzing, with interest, and his costs expended in *Watson* v. *Roberts*, if they found that the value of the property replieved by and delivered to Watson at the time it was so delivered, and not returned to Roberts or placed in subjection to the plaintiff's judgment against the Kintzings, was equal to the said balance of said judgment and the amount of said costs; and if said property was not equal to said balance and said costs, that the jury should assess plaintiffs' damages at the amount they should find said property was worth at the time of its delivery to Watson, and the amonnt of plaintiffs' costs in *Watson* v. *Roberts*, with interest on such amounts at ten per cent. per annum. (13th exception, Rec., pp. 29, 32.)

9. In giving the second instruction asked for by the plaintiff, that the only question for the jury to determine was, whether possession of the property delivered to Watson was ever returned to Roberts, and to determine the value of said property so delivered to Watson and not so returned. (14th exception, Rec., p. 30, fol. 60.)

10. In refusing the first instruction to the jury asked for by the defendants, that it was necessary for plaintiff, in order to recover, to prove that a demand was made on the defendants for the return of the property replevied in *Watson* v. *Roberts*. (17th exception, Rec., p. 31.)

11. In refusing the second instruction to the jury asked for by defendants, that the only interest plaintiff could claim in the goods sought to be replevied in the suit of *Watson* v. *Roberts* was just the interest the Kintzings had at the time of the levy of the attachment thereon, and that plaintiff could recover no greater amount of defendants in this action than the value of the interest of the Kintzings in said goods. (18th exception, Rec., p. 31.)

12. In refusing the sixth instruction asked for by defendants, that unless the plaintiff had proved that a writ

of *retorno habendo* had been issued previous to the commencement of this action, the jury should find for defendants. (21st exception, Rec., p. 31, fol. 64.)

ARGUMENT.

I.

It will not be necessary to discuss the foregoing errors in detail. It is obvious they raise all the questions considered in the written opinions of the District and Supreme Courts, and decided by them against the plaintiffs in error. (Op. of District Court, Rec., pp. 17–20; Op. of Supreme Court, Rec., pp. 45–50.)

If the court below erred in its determination of any of those questions, the judgment must be reversed, and a new trial ordered.

The *first* question is, whether or not Lomme was entitled to bring this action in his own name upon the undertaking to Roberts, in which the plaintiffs in error (defendants below) became sureties for Watson?

This question was raised by the motion of defendants for a non-suit, after plaintiff had given in evidence the record of the proceedings in *Watson* v. *Roberts*. (Rec., p. 16.) That motion was overruled, (Rec., p. 20,) and the overruling of it is now assigned for error.

Section 119 of the Civil Practice Act prescribes the form and substance of the undertaking on claim and delivery of personal property. (Laws of Montana, 1872, p. 49.)

The sureties therein are expressly bound to the *defendant* in the action for possession.

Now, there was no evidence offered by the plaintiff on the trial of any assignment whatever of the bond to him by Roberts.

No doubt, under the Code, that if the undertaking had been assigned to him, he might have sued, as the real party in interest, in his own name. But we submit, that without an assignment, he could not so sue upon the instrument.

Nor did the plaintiff below even show, or offer to show, that Roberts had ever delivered the bond to him.

If the original instrument was given in evidence on the trial (and it is not clear that it was) it was obtained doubtless by the plaintiff from the files of the clerk's office, in the case of *Watson* v. *Roberts*. Certainly no proof was offered at the trial of its delivery in any manner by Roberts to the plaintiff in this action.

The district court should have non-suited the plaintiff on that ground.

II.

The second question is, whether or not, inasmuch as the record of the action of *Watson* v. *Roberts* discloses no finding by the jury of the value of the property, and no alternative judgment by the court, as provided in section 240 of the Civil Practice Act, the defendants below, as sureties in an undertaking executed in that action, under section 119 of the Civil Practice Act, are liable at all upon that instrument?

We submit that they are not liable; and that in order to hold the sureties in such an undertaking in any case, the value of the property must be found by the jury in the replevin suit, and the alternative judgment provided for by section 240 entered in the case.

The district court should have non-suited the plaintiff on that ground also, and should have rejected all the evidence offered by him to prove the value of the property attached at the time it was replevied.

Inquiry as to the value of the property was pertinent and admissible in the replevin suit alone.

The sureties, in the event of a judgment for the return of the property, and the property could not be returned, undertook to pay only the amount of such judgment as should be rendered in the replevin suit against the plaintiff for the value of the property, and for the damages sustained by defendant on account of its detention. They became liable alone for the amount of such judgment for

the value as might be rendered in the replevin suit, in connection with a judgment for the delivery of the property.

No judgment for the value having been rendered in that suit, they cannot be charged with liability upon the undertaking.

This follows conclusively from the words of the undertaking and the provisions of the civil practice act.

The sureties in this case bound themselves to pay "*to the said defendant such sum as may from any cause be recovered against the said plaintiff*," (Rec., p. 10, fol. 19;) recovered, of course, against the plaintiff by the defendant in the *replevin suit.*

The language of the undertaking conforms strictly to the words of the 119th section of the statute. (Laws of Montana, 1872, p. 50.)

The condition of the undertaking, as prescribed by that section, is intended to refer, of course, to the provision of the 240th section, which prescribes the form and terms of the judgment in replevin, where the property has been delivered to the plaintiff. The judgment there prescribed is "*for a return of the property, or the value thereof, in case a return cannot be had, and damages for the taking and withholding the same.*" (Laws of Montana, p. 77.)

In *Watson* v. *Roberts*, the defendant took a judgment not appropriate to the action or warranted by law; and if the sureties were concluded, the effect would be to change their contract in a most material point. This was the view in a similar case, under a similar statute, of Judge Denio, of the *Court of Appeals of New York*, who said: "One of the most common principles in the law of principal and surety is that the latter cannot be charged beyond the fair import of his undertaking, nor where there has been any substantial change of the contract of the party for whose performance he has become responsible." (Gallarti *v.* Orser, 27 N. Y., 327.)

But it is unnecessary to discuss the question at length upon principle. It has been decided, in conformity with the view here presented, both by the Supreme Court of

California and the Court of Appeals of New York. Similar statutes are in force in both of those States; and the code of Montana was derived from them. The court should follow the adjudications in those States.

The Supreme Court of California, in *Nickerson* v. *Chatterton*, 7 Cal., 571, decided in 1857, said:

"The securities to the undertaking only bind themselves to make good such judgment as the plaintiff may lawfully obtain against the defendant. In other words, they only guaranty to make good such a judgment as the law allows to be rendered in such proceedings. If, therefore, the proper judgment be taken in the alternative, and the defendant fails to discharge the judgment, the securities can only be required to pay the value of the property, and the amount of damages and costs. . . . . There is no averment that any value was found by the jury or the court, in that case, and the allegation that neither the horse had been delivered, nor the *alleged* value had been paid, is not sufficient."

This and the subsequent cases were fully reviewed in 1864 by Sawyer, J., in *Clary* v. *Rolland et al.*, 24 Cal., 149, where the doctrine was said to be settled in California, that where it does not appear, in a suit to recover the possession of the property, that the value was found by the jury, or that an alternative judgment was rendered, the sureties in the undertaking are *not* liable.

The doctrine was recognized as good law by Mr. Justice Field, in delivering the opinon of the court in *Ginaca* v. *Atwood*, 8 Cal., 446. A sound distinction was there taken by that learned judge between a case of judgment of nonsuit in the action of replevin, and a case where (as here) the issues have been passed upon by the jury in that action.

Where (said Mr. Justice Field) there has been no opportunity for the jury in the replevin suit to find the value, (as when the suit has been discontinued, or the plaintiff has been non-suited,) the jury, in a suit on the bond, may inquire into the damages arising from the failure of plain-

tiff to return the property, *but not the damages for the original taking and detention.*

The Court of Appeals of New York, in *Gallarti* v. *Orser*, 27 N. Y., 327, proceeded upon the doctrine of the California cases. In that case the judgment was for damages, and there was no alternative judgment for a return of the property. DENIO, J., said:

"This was a departure from sec. 277 of the code, which prescribes the terms of a judgment. *The plaintiff is not entitled to waive the claim to the possession, and to have an absolute judgment, in damages, to the value of the property.*"

The Court of Appeals, in *Fitzhugh* v. *Wiman*, (5 Selden, 563,) Selden J., delivering the opinion of the court, had long before decided that in this species of action, judgment for the value of the property could only be taken in connection with a judgment for the recovery of the possession, as an alternative depending on the ability of the sheriff to find and deliver the property upon the execution. This case was decided in 1854—before the earliest decision in California.

The form of execution prescribed by the Montana code (sec. 251) for the delivery of the possession of personal property, is *identically* the same as provided by sec. 289 of the New York code, which was construed by Mr. Justice Selden, in *Fitzhugh* v. *Wiman*. (Laws of Montana, 1872, p. 81.)

We submit, therefore, that defendants were shown by the plaintiff's evidence to be not liable upon this undertaking, and the plaintiff should have been nonsuited.

III.

If the defendants below, contrary to the foregoing argument, were liable to any extent, they were liable only for such damages as the plaintiff might be able to prove that he had *actually* sustained from a failure of Watson to return the property replevied to Roberts; and that the district court erred in instructing the jury that the only questions

for them to determine were, whether possession of the property was ever returned to Roberts, and the value of the property delivered to Watson, and not so returned.

The absurdity of the charge given in compliance with the plaintiff's *first* and *second* request for instruction, (Rec., pp. 29, 30,) seems so apparent that comment is unnecessary. That charge is the subject of the 8th and 9th assignments of error.

In this view of the only possible liability of defendants, the district court also erred in refusing to instruct the jury that the plaintiff could recover no greater amount in this action than the value of the interest of the Kintzings, the defendants in the original attachment, in the property replevied.

If *they* had no interest in the property, the plaintiff, it would clearly seem, sustained no damages by reason of the failure of Watson to return the property to Roberts.

It is apparent that the plaintiff was not entitled to recover the value of the property or damages for the original taking and detention; and that the defendants' liability was limited to the plaintiff's actual damages arising from the failure of Watson to return the goods. And we submit that the court should have so instructed the jury.

Upon the principle adjudged by the Supreme Court of California in *Ginaca* v. *Atwood*, (8 Cal., 448,) no inquiry was permissible, except in regard to the actual damages, which arose from the failure of the plaintiff in the original replevin suit to return the property therein replevied.

IV.

We submit, lastly, that, upon the principles adjudged by the Court of Appeals of New York in *Fitzhugh* v. *Wiman* (5 Selden, 563) and *Gallarti* v. *Orser*, (27 N. Y., 327,) the plaintiff below could not recover against the sureties in the undertaking in the replevin suit without showing that an execution, as prescribed by section 251 of the Civil Practice Act, (in the nature of a writ of *retorno habendo*,) had

been issued upon the judgment rendered in that action, and duly returned unsatisfied by the sheriff.

By no other evidence could the fact, that a return of the property was not obtainable, be made to appear.

The court cannot say, but if a proper execution, in conformity with the judgment in the replevin suit, had been issued, the bail or the sheriff would have found the property, and have caused it to be placed in subjection to the execution of the plaintiff, for the satisfaction of his judgment against the defendants in the original attachment proceeding.

V.

The judgment of the court below should be reversed, and a *venire de novo* awarded.

J. Hubley Ashton,
N. Wilson,
Of Counsel for Defendants in Error.

Supreme Court of the United States.

OCTOBER TERM, 1874.

No. 40.

JOHN M. SWEENEY AND ANTON M. HOLTER,
PLAINTIFFS IN ERROR,

vs.

JOSEPH A. LOMME, DEFENDANT IN ERROR.

In Error to the Supreme Court of the Territory of Montana.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

On the 11th day of October, 1869, Joseph A. Lomme, the defendant in error, commenced an action in the District Court for the Third Judicial District of the Territory of Montana, against B. C. and Charles S. Kintzing, to recover a debt for the sum of $4,384.89, with interest thereon. And, on the same day, Lomme, for the purpose of securing any judgment he might obtain in said suit, sued out a writ of attachment which was delivered to W. K. Roberts, the sheriff, and by him levied upon certain goods and chattels as the property of the said B. C. and Charles S. Kintzing.

On the 12th day of October, 1869, one W. S. Watson, claiming to be the owner of this property, brought an action of replevin against the sheriff, W. K. Roberts, and thus obtained possession of the said property. In this action, John M. Sweeney and Anton M. Holter, the plaintiffs in

error, entered into an undertaking to Roberts, in the sum of $5,000, conditioned for the prosecution of the said action by the said Watson; for the return of the said property by him, if return thereof should be adjudged, and for the payment to the defendant, of such sum as might, from any cause, be recovered against the plaintiff.

In the first case above named, the plaintiff, Lomme, recovered judgment against the defendants, B. C. and Charles S. Kintzing, on the 26th of October, 1870, for the sum of $4,954.93 debt, and costs of suit.

And in the second case mentioned above, the defendant, Roberts, obtained a verdict and judgment against the plaintiff, Watson, on the 6th of April, 1870. The verdict of the jury was:

"We, the jury, in the above entitled cause, find for defendant."

On this verdict, the Court entered the following judgment:

"This action came on regularly for trial. The said parties appeared by their attorneys. A jury was regularly impanneled and sworn to try said action. Witnesses on the part of plaintiff and defendant, were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court, and being called, answered to their names, and say they find a verdict for the defendant. And afterwards, on the 6th day of April, A. D. 1870, it is ordered by the Court, that the judgment be entered herein upon the verdict, in favor of said defendant, W. K. Roberts, and against the said plaintiff, W. S. Watson, for the return of the property replevied in this action, together with said defendant's costs and disbursements in this action incurred.

"Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged that said defendant, W. K. Roberts, do have and recover from said plaintiff, W. S. Watson, the possession of said property replevied in this action, together with said defendant's costs and disbursements incurred in this action, amounting to

the sum of five hundred and fifty-two dollars and five cents."—*Record*, 8.

The said undertaking was, thereupon, delivered to Lomme; and neither the said property nor any part thereof having been returned, and the judgment last referred to, not having been satisfied, Lomme, in February, 1871, instituted suit in said Court, upon the said undertaking, against Sweeney and Holter.

To the complaint filed by the plaintiff in this action, the defendants interposed a demurrer which was overruled by the Court in a written opinion, (*Record*, 17, 18, 19, 20,) to which we beg leave to direct the attention of the Court.

It appears by the record, (*p.* 5,) that this cause coming on for trial, a jury was duly impanneled; that testimony was introduced by the parties, and (*p.* 29,) that the cause was submitted to the jury after instructions by the Court. And in the record, (*p.* 33,) there appears, under date of November 21, 1871, the following notice of appeal to the Supreme Court of the Territory, signed by the counsel of the defendants, Sweeney and Holter, and addressed to the clerk of the District Court, and to the counsel for Lomme, the plaintiff:

"You will please take notice, that the defendants in the above entitled cause, hereby appeal to the Supreme Court of this Territory, from the judgment therein made and entered in the said District Court, on the 10th day of November, A. D. 1871, in favor of the plaintiff and against the defendants, and from the whole thereof."

On the same page of the record, there appears the following entry:

"On the 22d day of November, A. D. 1871, the defendants filed herein their undertaking on appeal, which is in words and figures following, to wit."

And, then, follows the defendants' undertaking on appeal.

But no verdict or judgment in the case, appears in the record.

In the Supreme Court of the Territory, on the 19th of August, 1872, "the judgment of the Court below was affirmed."—*Record*, 50.

The case was, then, brought by writ of error, to this Court.—*Record*, 51.

POINTS.

I.

The 22d section of the Judiciary act of 1789, (1 *Statutes*, 84,) gives writs of error from this Court, to the Circuit Courts of the United States, in cases of "final *judgments*," in certain causes therein specified. The 9th section of the act of May 26, 1864, (13 *Statutes*, 88, 89,) provides that "writs of error and appeals from the final decisions of the Supreme Court of said Territory, shall be allowed, and may be taken to the Supreme Court of the United States, in the same manner, and under the same regulations, as from the Circuit Courts of the United States."

There being no *judgment* in the record in this case, it is submitted, that this Court has no jurisdiction, and that the writ of error should be dismissed.

II.

But should this Court take jurisdiction of the case, then, the decision of the Court below should be affirmed.

The undertaking sued on by Lomme, was executed for his benefit alone. Manifestly he was the real party in interest, and under the Civil Practice Act of Montana, passed December 23, 1867, the action was properly brought in his name. The 4th section of that act provides as follows:

"SEC. 4. Every action shall be brought in the name of the real party in interest, except as otherwise provided in this act."

The above is identical with a provision contained in a statute of California, and that statute has received a judicial interpretation in that State, in accordance with the construction for which we here contend. The act of the

Legislature of California referred to, was passed May 15, 1854, and is entitled "An Act amendatory and supplemental of the Act entitled 'An Act to regulate proceedings in civil cases in Courts of Justice of this State.'" It enacts:

"SEC. 2. Section four of said act is amended, so as to read as follows:

"SECTION 4. Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act; but this section shall not be deemed to authorize the assignment of an account, unliquidated demand, or of a thing in action not arising out of contract."—*Statutes of California*, 1854, *Chapter* LIV.

In the case of Baker *vs.* Bartol, (7 *California*, 551, 554,) the Supreme Court of California said:

"Formerly, where a bond was given to an officer, State or corporation, suit had to be brought in the name of the party holding the legal title, for the benefit of the person interested, but our statute has introduced a new rule, and by the provisions of the Practice Act, the suit must be prosecuted in the name of the real party in interest. The declaration and bond show, beyond all doubt, that Baker, the present plaintiff, is the true party in interest, and there was no error in declaring in his own name."

And in Summers *et al. vs.* Farish *et al.*, (10 *California*, 344, 351, 352,) the same Court held:

"Whatever the rule may be under the old system, we think that, under our system, the right of action is in the party sustaining the injury; for, on a recovery, the other party, if entitled to receive the money at all, if judgment were had in the name of both, would hold it by right of, and as trustee for, the other; and our Practice Act, for convenience, has given the right to sue to the party beneficially entitled to the fruits of the action."

This point is fully discussed in the opinion of the Court below, (*Record*, 46, 47,) and in the argument of the counsel for Lomme, (*Record*, 38 *to* 41.)

III.

Under the Civil Practice Act of Montana, passed December 23, 1867, to which reference has already been made, it was not necessary for Roberts, in his replevin suit against Watson, to obtain an alternative judgment for the value of the property in case a return thereof could not be had, in order to fix the liability of the defendants below upon the said undertaking. The act above referred to, provides:

"SEC. 177. In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff; or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of the defendant, they also find that he is entitled to a return thereof, shall find the value of the property; and may, at the same time, assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property."

A statute of the State of Indiana, approved June 18, 1852, contains the following provisions:

"SEC. CCCXXXIX. In an action for the recovery of specific personal property, the jury must assess the value of the property, as also the damages for the taking or detention, whenever, by their verdict, there will be a judgment for the recovery or return of the property."—*Gaven and Hord's Statutes, Vol.* 2, *p.* 206.

"SEC. CCCLXIV. In an action to recover the possession of personal property, judgment for the plaintiff may be for the delivery of the property or the value thereof in case a delivery can not be had, and damages for the detention. Where the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for the return of the property, or its value in case a return cannot be had, and damages for the taking and withholding of the property."—*Gaven and Hord's Statutes, Vol.* 2, *p.* 219.

These provisions, it will be seen, are substantially the same as those quoted from the statute of Montana. And

in the case of Whitney *et al. vs.* Lehmer *et al.*, (26 *Indiana*, 503,) which was an action on a replevin bond, the Supreme Court of Indiana held that where, in an action of replevin, the defendant has judgment for a return of the property, but the value of the property is not ascertained by the verdict of the jury, as the statute requires, the defendant may still have his action on the bond to recover the value of the property; and that the statute which requires the jury to assess the value of the property in such cases, and provides that the judgment may be in the alternative, for the return of the property, or for its value, in case a return cannot be had, provides a new remedy, but does not destroy the remedy at common law, by a suit upon the bond for a breach of its condition.

And see the opinion of the Court below, (*Record*, 47 *to* 49,) and argument of counsel, (*Record*, 41, 42,) and authorities cited in both.

IV.

The Court below was right in ruling that the defense of the bankruptcy of Charles S. Kintzing, set up by the defendants in this action, was wholly untenable.

We submit that the reasoning of the Court (*Record*, 49,) and the authorities cited in the argument of counsel (*Record*, 42, 43,) are conclusive on this point.

V.

It was not necessary for the plaintiff below to have a writ *de retorno habendo* issued and returned unsatisfied, before he could bring and maintain this action. This question has been repeatedly decided.

The rule of law applicable in such cases, as derived from the authorities, is concisely stated by the Supreme Court of Illinois, in Peck *et al. vs.* Wilson, (22 *Illinois*, 206,) in these words:

"We are not of opinion that a writ of *retorno habendo* should actually issue, and *elongata* be returned, before an

action can be brought on the replevin bond. It is sufficient that the judgment award the return, and to prove that no return was made."

See opinion of the Court below, (*Record*, 49, 50,) and argument of counsel (*Record*, 43, 44,) and authorities there cited.

VI.

The value of the property was properly ascertained from the evidence in this case alone, and not from the complaint and answer in the replevin suit of Watson *vs.* Roberts.

In support of this point, we refer to the opinion of the Court below, (*Record*, 50,) and the argument of counsel, (*Record*, 44.)

ROBERT LEECH,
Of Counsel for Defendant in Error.